SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 544.

THE NOBLE STATE BANK, A CORPORATION, PLAINTIFF IN ERROR,

vs.

C. N. HASKELL, G. W. BELLAMY, J. P. CONNORS, J. A. MENEFEE, M. E. TRAPP, AND H. H. SMOCK, DEFENDANTS IN ERROR.

MOTION TO ADVANCE.

And now come C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee, M. E. Trapp, and H. H. Smock, defendants in error, by E. G. Spilman, Assistant Attorney General of the State of Oklahoma, their Solicitor and counsel, and move the court to advance the above-entitled case for hearing at an early date convenient to the court, and respectfully represent to the court:

That the above-entitled cause involves the validity of an act passed by the legislature of the State of Oklahoma in December, 1907, commonly known as the Depositors' Guaranty Fund Law, which said act provides that all banks subject to its operation shall be subject to assessment for the

purpose of creating a fund to pay the depositors of any such banks which may become insolvent; this suit was brought by the plaintiff in error to enjoin the defendants in error, who constitute the State Banking Board of the State of Oklahoma, from enforcing against the plaintiff in error the collection of an assessment levied by said board pursuant to said act of the legislature, and comes before this court upon writ of error allowed by the Supreme Court of the State of Oklahoma on September 17, 1908.

It is respectfully shown to the court that there are about 500 banks in the State of Oklahoma subject to the operation of the law, and that all of said banks, as well as all of their depositors and the public generally in the State of Oklahoma, are vitally interested in the decision of this case.

This case is now 544 upon the calendar of this court. Defendants in error make this motion to advance pursuant to Rule 26 of the court, on account of the general public interest in the questions involved in this cause, and because there are special and peculiar circumstances, such as are contemplated by the rule involved in its consideration, especially those circumstances connected with the fiscal affairs of the State, and directly with the revenues thereof.

Your petitioner, therefore, prays that this honorable court will advance said case and set it down for an early hearing.

E. G. SPILMAN,
Assistant Attorney General for the
State of Oklahoma,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 544.

NOBLE STATE BANK, *a Corporation, Plaintiff in Error,*
vs.
C. N. HASKELL ET AL., *Defendants in Error.*

Please take notice that I will submit the annexed motion to this court on the 25th day of January, 1909, at the opening of court on that day.

Dated WASHINGTON, D. C., *January* 6, 1909.

Yours, etc.,

E. G. SPILMAN,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

United States

Noble State Bank, a Corporation,
Plaintiffs in Error,

vs.

C. N. Haskell, et al,
Defendants in Error.

MOTION TO ADVANCE.

Come now the plaintiff in error by Mr. C. B. Ames, its attorney, and the defendants in error by Honorable Charles West, Attorney General of the State of Oklahoma, their attorney, and respectfully move the court to advance said cause on the docket of said Court and assign the same for oral argument at the earliest possible time, and in support of said motion the parties hereto respectfully represent.

That the above entitled cause involves the validity of an act passed by the Legislature of the State of Oklahoma in December, 1907, commonly known as the Depositors Guaranty Fund Law, which said act provides that all banks subject to its operation shall be subject to assessment for the purpose of creating a fund to pay the depositors of any such banks which may become insolvent; this suit being brought by the plaintiff in error to enjoin the defendants in error, who constitute the State Banking Board of the State of Oklahoma, from enforcing against the plaintiff in error, the collection of an assessment levied by said Board pursuant to said act of the Legislature.

Said parties respectfully show to the court that there are about five hundred banks in the State of Oklahoma subject to the operation of the law and that all of said banks as well as all of their depositors and the public generally, in the State of Oklahoma, are vitally interested in the decision of said case.

Said parties further respectfully show to the court that one of the candidates for President of the United States is now running on a platform advocating an act of Congress similar to that passed by the Legislature of the State of Oklahoma, and that the subject of a guaranty of bank deposits is one which has become of interest not only to the people of Oklahoma, but to the people of the entire United States.

WHEREFORE, on account of the general public interest in the questions involved in this cause and the importance of an early and speedy decision of the vital legal propositions involved, the said plaintiff in error and the

said defendants in error join in this motion to advance the hearing of said cause, and to assign the same for oral argument at the earliest possible time which will suit the convenience of the Court.

C B Ames

D. T. FLYNN,
C. B. AMES,
Attorneys for Plaintiff in Error.

CHARLES WEST,
Attorney General of the State of Oklahoma,
Attorney for Defendants in Error.

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1908

Noble State Bank, a corporation,
Plaintiff in Error

vs.

C. N. Haskell, G. W. Bellamy, J. P. Conners, J. A. Menefee, M. E. Trapp, and H. H. Smock,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

This is a proceeding by plaintiff in error (plaintiff below) seeking to reverse the decision of the Supreme Court of Oklahoma, upholding the constitutionality of the recent act of the Legislature of the State of Oklahoma creating a Depositors' Guaranty Fund.

The petition, omitting the caption and Exhibits, is as follows:

"Comes the Plaintiff in said cause and for its cause of action against the defendants states the following facts:

1.

The said plaintiff is a corporation organized under the laws of the Territory of Oklahoma.

2.

The defendant, C. N. Haskell, is the Governor of the State of Oklahoma, the defendant G. W. Bellamy is the Lieutenant Governor, the defendant J. P. Connors is the President of the State Board of Agriculture, the defendant J. A. Menefee is the State Treasurer, the defendant M. E. Trapp is the State Auditor, and the defendant H. H. Smock is the Bank Commissioner of the State of Oklahoma.

3.

The said plaintiff is a banking corporation organized under the laws of the Territory of Oklahoma, with an authorized and paid up capital stock of ten thousand dollars, and its articles of incorporation were filed in the office of the Secretary of the Territory of Oklahoma on the 23rd day of May, 1902, a copy of said articles of incorporation being hereto attached, marked "Exhibit A" and referred to as part of this petition.

On said 23rd day of May, 1902, the Territory of Oklahoma issued to the said plaintiff a patent, a copy of which is hereto attached, marked "Exhibit B" and referred to as a part of this petition, and on the 7th day of July, 1902, the Bank Commissioner of the Territory of Oklahoma issued to said plaintiff a certificate of authority, as required by the laws of said Territory, a copy of which is hereunto attached, marked "Exhibit C" and referred to as a part of this petition.

4.

The said plaintiff has continuously since the 23rd day of May, 1902, in the town of Noble, County of Cleveland, Oklahoma, been engaged in the business of banking, as authorized by law, and its authority by virtue of its articles of incorporation, patent and certificate of authority, and since the 16th day of November, 1907, said plaintiff

in the same place, has been engaged in the banking business under and by virtue of the constitution and the laws of the State of Oklahoma.

5.

On the 17th day of December, 1907, the Governor of the State of Oklahoma approved an act which had previously been passed by the legislature of the State of Oklahoma entitled "An Act creating a State Banking Board, Establishing a Depositors' Guaranty Fund to Insure Depositors Against Loss when the bank becomes insolvent, Prescribing the qualifications of Officers and Directors, Fixing the salary of Bank Commissioner and his assistants and providing for more frequent Examinations, Fixing penalty for embezzlement, limiting the amount of the Bank Funds that can be loaned to any one person, corporation or firm, Declaring an Emergency."

Section 1 of said Act provides that "A state banking board is hereby created, to be composed of the Governor, the Lieutenant Governor, President of the State Board of Agriculture, State Treasurer and the State Auditor," and the said defendants, C. N. Haskell, G. W. Bellamy, J. P. Connors, J. A. Menefee and M. E. Trapp, are, respectively, the Governor, Lieutenant Governor, the President of the State Board of Agriculture, the State Treasurer, and the State Auditor, and the said named defendants by virtue of said act constitute the State Banking Board of the State of Oklahoma, and the said defendant, H H. Smock is the bank commissioner of the State of Oklahoma.

6.

By section 2 of said Act it is provided that "Within sixty days after the passage and approval of this act, the State Banking Board shall levy against the Capitol Stock an assessment of one per cent of the Bank's daily average deposits, less the deposits of the State funds, properly secured for the preceding year, upon each and every bank organized and existing under the laws of the state, for the purposes of creating a Depositors' Guaranty Fund. Said assessment shall be collected upon call of the State Banking Board. In one year from the time the first assessment is levied, and annually thereafter, each bank subject to

the provisions of this act shall report to the bank commissioner the amount of its average daily deposits for the preceding year, and if said deposits are in excess of the amount upon which one per cent was previously paid, said report shall be accompanied by additional funds to equal one per cent of the said daily average excess of deposits, less the deposit of the state funds properly secured and less the deposits of the National Government for the year over the preceding year, and each amount shall be added to the Depositors' Guaranty Fund. If the Depositors' Guaranty Fund is depleted from any cause, it shall be the duty of the State Banking Board in order to keep said fund to one per cent of the total deposits in all of the said banks subject to the provisions of this act, to levy a special assessment to cover such deficiency, which special assessment shall be levied upon the capital stock of the banks subject to this act, according to the amount of their deposits as reported in the office of the Bank Commissioner. And said special assessment shall become immediately due and payable."

And the plaintiff states that the said State Banking Board, acting under and pursuant to the pretended authority of said law, has levied an assessment against the capital stock of this plaintiff bank of one per cent of its daily average deposits during the preceding year, which said average deposit amounts to Thirty-three Thousand One Hundred and Forty-seven Dollars ($33,147.00), and that the said State Banking Board and the said Bank Commissioner under and pursuant to said pretended law, propose to compel this plaintiff to pay said one per cent of its daily average deposits for the preceding year for the purposes of creating said Depositors' Guaranty Fund for the benefit of the depositors of all of the banks in said State upon which said law operates, and that the said defendants, unless restrained by this court, will force this plaintiff to pay said assessment as provided by said pretended law. A copy of the said notice of assessment served on plaintiff is hereto attached, marked "Exhibit D" and referred to as a part of this petition.

7.

Plaintiff further states that the said law under which the defendants are pretending to act is in conflict with

and a violation of Section 2 of Article 2 of the Constitution of Oklahoma, which provides that "all persons have the inherent right to life, liberty, the prusuit of happiness, and the enjoyment of the gains of their own industry," in that said law deprives this plaintiff of the enjoyment of the gains of its own industry, for the benefit of the depositors of other banks in which plaintiff has no interest.

8.

Plaintiff further states that said pretended act is in conflict with and a violation of Section 7 of Article 2 of the Constitution of Oklahoma, which provides that, "No person shall be deprived of life, liberty or property, without due process of law," in that the said plaintiff is deprived of its property by virtue of said assessment without due process of law.

9.

Plaintiff further states that said proposed law is in conflict with and a violation of Section 15 of Article 2 of the Constitution of Oklahoma, which provides that "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed," in that said law violates the contract between this plaintiff and the State of Oklahoma, evidenced by its charter patent. and certficate of authority, copies of which are hereunto attached as Exhibit "A", "B", and "C" to this petition.

10.

Plaintiff further states that said pretended law is in conflict with and a violation of Section 23 of Article 2 of the Constitution of Oklahoma, which provides that "No private property shall be taken or damaged for private use with or without compensation, unless by the consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining or sanitary purposes, in such manner as may be prescribed by law," in that the private property of this plaintiff is sought to be taken for private use, without compensation and against the consent of the plaintiff.

11.

Said pretended law is in conflict with and a violation of Section 24 of Article 2 of the Constitution of Oklahoma, which provides that "Private property shall not be taken or damaged for public use without just compensation," in that said law proposes to take the property of this plaintiff and if it be held that said taking is a taking for public use, then said taking is without compensation and not in accordance with the form prescribed for the taking of private property for public use, as set out more fully in said Section 24.

12.

Said plaintiff states that said pretended law is in conflict with and a violation of Section 57 of Article 5 of the Constitution of Oklahoma, which provides that "Every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes, and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length, Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof," in that said law,

(1) Creates a State Banking Board;

(2) Establishes a Depositors' Guaranty Fund;

(3) Prescribes the qualifications of officers and directors;

(4) Fixes the salary of the Bank Commissioner;

(5) Fixes the penalty for embezzlement;

(6) And limits the amount of the bank's funds that can be loaned to any one person;

And expresses all of said six different purposes in the title, thus avoiding the entire act.

13.

Plaintiff further states that if said pretended law shall be construed as levying a tax upon the property of

plaintiff, that it is in conflict with and a violation of Section 8 of Article 10 of the Constitution of Oklahoma, which provides that "all property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale," in that said law, if it levies a tax does not assess it upon the basis of the fair cash value of the property affected, but upon an arbitrary basis having no regard to the fair cash value of the property assessed.

14.

If said pretended law is construed as levying a tax then it is in conflict with and in violation of Section 9 of Article 10 of the Constitution of Oklahoma, which provides that, "Except as herein otherwise provided, the total taxes, on an ad valorem basis, for all purposes, State, county, township, city or town, and school district taxes, shall not exceed in any one year thirty-one and one-half mills on the dollar," in that said law, for said special and private purposes, if it be construed as levying a tax, levies a tax on this plaintiff of about 3.31 per cent of the fair cash value of the property of plaintiff.

15.

If said pretended law shall be construed as levying a tax, then it is in conflict with and in violation of Section 14 of Article 10 of the Constitution of Oklahoma, which provides that "Taxes shall be levied and collected by general laws, and for public purposes only, except that taxes may be levied when necessary to carry into effect Section thirty one of the Bill of Rights," in that said law, if it be construed as levying a tax, does not levy said tax for public but for private purposes.

16.

Plaintiff further states that said pretended law is in conflict with and a violation of Section 1 Article 14 of the Constitution of Oklahoma, which provides that "General laws shall be enacted by the legislature providing for the creation of a banking department, to be under the control of a Bank Commissioner, who shall be appointed by the Governor for a term of four years, by and with the consent of the senate, with sufficient power and authority to reg-

ulate and control all State Banks, Loan, Trust, and Guaranty Companies, under laws which shall provide for the protection of depositors and individuel stockholders," in that said pretended law does not provide for the protection of the individual stockholders of this plaintiff.

17.

Plaintiff further states that said pretended law is in conflict with and in violation of Section 10 of Article 1 of the Constitution of the United States, which provides that "No state shall . . . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts . . " in that said law impairs the obligation of the contract between the plaintiff and the State of Oklahoma as evidenced by its articles of incorporation, patent, and certificate of authority, copies of which are hereto attached as Exhibits "A", "B" and "C".

18.

Plaintiff further states that said pretended law is in conflict with and a violation of that portion of the 14th Amendment to the Constitution of he United States which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," in that said pretended act deprives this plaintiff of its property without due process of law and denies to it the equal protection of the laws.

19.

Wherefore plaintiff states that the said pretended act is null and void, because it is in conflict with the Constitution of the State of Oklahoma and the Constitution of the United States, and that the said defendants, in acting under and enforcing the provisions of said pretended law, are wholly without right and have no jurisdiction to make levy or enforce the aforesaid assessment of one per cent upon the average deposits of the plaintiff.

20.

Plaintiff further states that it is a solvent going concern, with its capital unimpaired and perfectly able and willing to pay all its obligations to its depositors, and that it does not need and does not desire the assistance of any other bank or of the State of Oklahoma.

21.

Plaintiff further states that it has no adequate remedy at law to prevent the wrongs herein complained of, and that, unless the defendants are enjoined from enforcing the provisions of said law as against this plaintiff, it will be remediless.

WHEREFORE, Plaintiff prays for a temporary injunction, restraining the said defendants and each of them, from taking any further or other proceedings to levy against or collect the said assessment of one per cent or any other assessment under said law against this plaintiff, and that on final hearing said temporary injunction may be made permanent, and plaintiff prays for such other, further and general relief as to the wisdom of the court may seem proper.

J. B. DUDLEY,
FLYNN & AMES,
Attorneys for Plaintiff.

The defendants in error filed separate demurrers to the petition raising three questions, viz.: whether this is a suit against the State; whether the petition stated facts entitling the plainiff to equitable relief; and whether the act was constitutional.

The trial court decided the first two questions in favor of the plaintiff in error, but held that the act was constitutional, and it is this question which we now desire to present.

We call particular attention to the following features of the law:

The assessment is compulsory, not voluntary.

It is entirely unlimited and may take all of the assets of the bank.

It does not operate simply upon banks chartered or re-chartered after its passage, but upon all banks both old and new.

The fund raised is not applied to any governmental purpose but is donated to private citizens who happen to be depositors of an insolvent bank.

The supreme Court of Oklahoma held that this law is constitutional as an exercise of the power to amend charters and as an exercise of the police power. In their opinion, they first discuss the right of the state to amend charters under the reserved power, but we think that is a question to be considered after a careful analysis of the law, and, therefore, will not pursue that order in our brief.

In discussing the case, we prefer to proceed according to the following analysis:

FIRST.

The law requires a taking of the plaintiff's property.

SECOND.

This taking is for a private use.

Savings & Loan Ass'n. vs. Topeka, 20 Wallace 655; 22 Lawyers Ed. 460.
State vs. Osawkee Twp. 14 Kans. 418.
Lowell vs. Boston, 111 Mass. 454; 15 Am. Rep. 39.
B. & E. R. Co. vs. Spring, 80 Md. 510; 27 L. R. A. 72.
Mo. Pac. R. Co. vs. Nebraska, 164 U. S. 403; 17 Sup. Ct.; Rep. 130-135.

THIRD.

It is not an exercise of the right of eminent domain.

FOURTH.

It is not an exercise of the power of taxation.
Savings & Loan Ass'n. vs. Topeka, supra.
State vs. Osawkee Twp. supra.
Lowell vs. Boston, supra.
B. & E. R. Co. vs. Spring, supra.
Southerland Innes Co. vs. The Village of Evert, (C. C. A.) 86 Fed. 597.
Weismer vs. The Village of Douglas, 64 N. Y. 91. 21 Am. Rep. 586.

FIFTH.

It is not a valid exercise of the police power.
The Hannibal & St. Joseph R. Co. vs. Husen, 95 U. S. 465; 24 Lawyers Ed. 527.
Minn. vs. Barber, 136 U. S. 313; 10 Sup. Ct. Rep. 862.
Lawton vs. Steele, 152 U. S. 133; 14 Sup. Ct. Rep. 499.
Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362; 14 Sup. Ct. Rep. 1047
G. C. & S. F. R. Co. vs. Ellis, 165 U. S. 150; 17 Sup. Ct. Rep. 255.
Lakeshore & M. S. R. Co. vs. Smith, 173 U. S. 684; 19 Sup. Ct. Rep. 656.
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540; 22 Sup. Ct. Rep. 431.
C. B. & Q. R. Co. vs. Illinois, 200 U. S. 561; 26 Sup. Ct. Rep. 341.
Adair vs. U. S., 208 U. S. 161; 28 Sup. Ct. Rep. 277-280.
A. T. & S. F. R. Co. vs. Campbell, 61 Kans. 439; 48 L. R. A. 251.
Colon vs. Lisk, (N. Y.) 47 N. E. 302.

SIXTH.

It is, therefore, a taking of property without due process of law and violative of the Constitution of the United States.
Holden vs. Hardy, 169 U. S. 366; 18 Sup. Ct. Rep. 383.
Cotting vs. Goddard, 183 U. S. 79; 22 S. C. R. 30.

Harding vs. Butts, 18 Ill. 503.
Embury vs. Connor, 3 N. Y. 512.
Atty. & Gen. vs. B. & A. R. Co. (Mass.) 35 N. E. 252.
A. T & S. F. R. Co. vs. Campbell, supra.
Mays vs. Seaboard Air Line Ry. (S. C.) 56 S. E. 30.
Mo. Pac. R. Co. vs. Nebraska, 164 U. S. 403.

SEVENTH.

In taking the plaintiff's property, it impairs the obligation of contracts and, being a taking without due process of law, cannot be upheld as an amendment of the plaintiff's charter.

Fletcher vs. Peck, 6 Cranch, 135.
Sinking Fund cases, 99 U. S. 720, 748.
Lakeshore & M. S. R. Co. vs. Smith, 173 U. S. 684; 19 S. C. R. 565.
People vs. O'Brien, N. Y. 18 N. E. 692.
Opinion of the Justices, 33 Atl. 1079. 1083.
Hill vs. Glasgow R. Co., 41 Fed. 615, 617.
A. T. & S. F. R. Co. vs. Campbell, supra.
Grand Rapids Sav's Bank vs. Warren, 52 Mich. 557; 18 N. W. 356.
Hathorn vs. Calef, 2 Wall. 10; 17 Law. Ed. 776.
McDonnell vs. Ala. G. L. Ins. Co., Ala. 5 South. 120.
Ireland vs. The P. B. Etc. Turnpike Co., 19 Ohio State 369.
Mays vs. Seaboard Air Line Ry. supra.
Vicksburg vs. Vicksburg Waterworks Co., 202 U. S. 453; 26 S. C. R. 660.

EIGHTH.

The Governor, when acting as a member of the Board, is subject to the control of the courts.

Reagan vs. Farmers' Loan & Trust Co., supra.
Ralston vs. Crittendon, Governor, 120 U. S. 390; 7 Sup. Ct. Rep. 599.
Davis, Governor, vs. Gray, 16 Wall. 203; 21 Lawyers, 623.
Scott vs. Donald, 165 U. S. 58; 17 Sup. Ct. Rep 265.

Smyth vs. Ames, 169 U. S. 466; 18 Sup. Ct. Rep. 418, and cases therein cited.
Ex Parte Young, 209 U. S. 123; 28 Sup. Ct. Rep. 441.

NINTH.

The petition alleges, and the demurrer admits that it is the purpose of the defendants to compel the plaintiff to pay the assessment required by the law. It therefore, shows a sufficient state of facts to justify relief by injunction.

Reagan vs. Farmers' Loan & Trust Co., supra.
Smyth vs. Ames, supra.

FIRST.

The assessment levied upon the plaintiff, if enforced, amounts to and is an actual taking of its property.

This is so plain a proposition that it will not be disputed.

Under the law and the assessment which has been made, the plaintiff is required to remit to the State Banking Board, one-half of one per cent of its average deposits, amounting to $165.73. The other one-half of one per cent required by the law, and all future assessments made under the law, must be remitted in the same way, to the State Banking Board.

This money, when remitted to the Banking Board, passes out of the possession of the plaintiff, into the possession of the State Banking Board, and becomes a part of the depositors' guarantee fund. It is no longer subject to the control of the plaintiff. He can not withdraw it or hypothecate it, or in any way use it. He therefore has neither the possession of it nor the right to use, con-

trol, or dispose of it, but it has passed from his possession and control into the possession and control of the State Banking Board, and not only has it passed, but it has irrevocably passed. It can never be returned to the plaintiff under any circumstances. But it is held for the purpose of paying the depositors of some bank which may fail.

In the English law, possession is an earlier idea in point of history than title, but this act directly invades both possession and title and by every test is a taking of the plaintiff's property.

SECOND.

The taking of plaintiff's property is for private use.

This depositors' guaranty fund can be used for only one purpose and that is to pay the depositors of any bank which fails. The depositor in a bank is simply a person who has loaned money to the bank. The purpose of this fund is to guarantee that the bank, on demand, will pay these loans. It is possible that the bank which fails may have ten depositors or ten thousand depositors, but whether its depositors be few or many, the principle is not changed, and the law provides a fund to guarantee the payment of the bank's debts to its depositors.

This is just as much a private purpose as guaranteeing the payment of the debts of the lawyers or retail merchants or any other class of our citizens.

Property is taken for public use when it is taken for the use of the public. When property is taken under the right of eminent domain for a railroad, every member of the public has a right to use the railroad. When property is taken to build a courthouse it is for public use because

every member of the public has a right to use the courthouse. When the property of the citizen is taken by taxation, it is taken for a public use, because the entire amount is used in administering organized government, and every member of the public has his immediate, direct and personal benefit therefrom. Here, however, plaintiff's money is not taken to support the government, or any of its officers or agencies; but it is given—donated—to private persons to whom neither the plaintiff nor the state owes any special duty.

The difference between a public use and a private use is in the right of the public to the use.

This law raises a fund, not for the use of the public but only for the benefit of those persons who have used bad judgment in selecting a bank to which they will lend their money. The deposit of money in a bank is a pure loan, nothing more, nothing less, and the law is so definitely settled, that authorities need not be cited. When one man lends his money to another, that is a private, not a public transaction. When the debtor repays the loan, that is a private, not a public transaction. If the same person borrows money from a thousand people, that does not change the nature of the relation arising. It is still a private transaction between him and each one of the thousand from whom he has borrowed.

The case of the Savings & Loan Association vs. Topeka, 20 Wallace, 655, 22 Lawyers' Ed. 460, in our judgment, closes the argument upon this proposition, and conclusively establishes that plaintiff's property is taken under this law for a private use. That was a case in

which the city of Topeka, acting under specific legislative permission, voted bonds to induce the location in the city of bridge shops. These bonds were authorized by a vote of the people; were issued by the city authorities, and passed into the hands of purchasers. The shops were located and the city paid one installment of interest. The power of the city to issue the bonds was then raised and suit was brought by the Savings & Loan Association as the purchaser. The question turned upon the purpose for which the bonds werei ssued, and the court held that while the city and its inhabitants were indirectly benefitted by the location of the bridge shops just as they would be benefitted by any institution employing labor and building up the community, that this public benefit was merely incidental. that the use was a private one, and that as taxes could only be paid for public purposes, and as the bonds could only be paid by the levy of taxes, that they were absolutely void.

The syllabus of that case is as follows:

No. 1. A statute which authorizes towns to contract debts or other obligations payable in money, implies the duty to levy taxes to pay them, unless some other fund or source of payment is provided.

No. 2. If there is no power in the Legislature which passes such a statute, to authorize the levy of taxes in aid of the purpose for which the obligation is to be contracted, the statute is void, and so are the bonds or other forms of contract based on the statute.

No. 3. There is no such theory of our governments, state and national, as unlimited power in any of their branches. The Executive, the Legislative and the Judicial Departments are all of limited and defined powers.

No. 4. There are limitations of such powers, which arise out of the essential nature of all free governments;

implied reservations of individual rights, without which the social compact could not exist, and which are respected by all goverments entitled to the name.

No. 5. Among these is the limitation of the right of taxation, that it can only be used in aid of a public object, an object which is within the purpose for which governments are established.

No. 6. It cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefitted thereby.

No. 7. Though the line which distinguishes the public use for which taxes may be assessed, from the private use for which they may not, is not always easy to discern, yet it is the duty of the court where the case falls clearly within the latter class, to interpose when properly called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others.

No. 8. A statute, which authorizes a town to issue its bonds in aid of the manufacturing enterprise of individuals is void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profit of others, and not for a public use, in the proper sense of that term.

No. 9. And in a suit brought on such bonds or the interest coupons attached thereon, the circuit court properly declared them void. (That the town authorities have paid one installment of interest on these bonds, works no estoppel.)

Mr. Justice Miller, in delivering the opinion of the court establishes the foregoing doctrines in the following language:

"It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens

subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer; but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Whiting vs. Fond du Lac, 25 Wis., 188; Cooley, Const. Lim., 129, 175, 487; Dill. Mun. Cor. sec. 587.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited. It is true that express limitations on the amount of tax to be levied or things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of the government, the prosecution of war, the national defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

"The power to tax is, therefore, the strongest, the most pervading of all the powers of government, reaching

directly or indirectly to all classes of people. It was said by Chief Justice Marshall, in the case of McCulloch vs. Md., 4 Wheat., 431, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent imposed by the United States on the circulation of all other banks than the National Banks drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay, with one hand, the power of the government on the property of the citizens, and with the other to bestow upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under the legislative forms.

"Nor is it taxation. 'A tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or State.'

" 'Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes.' Cooley. Const. Lim., 479.

"Coulter, J., in Northern Liberties vs. St. John's Church, 13 Pa. St., 104, says, very forcibly, 'I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose.' See, also Pray vs. Northern Liberties, 31 Pa. St., 69; Matter of Mayor of N. Y., 11 Johns., 77; Camden vs. Allen, 2 Dutch., 398; Sharpless vs. Mayor, supra; Hanson vs. Vernon, 27 Ia., 47; Whiting vs. Fond du Lac (supra).

"We have established, we think, beyond cavil, that there can be no lawful tax, which is not laid for a public

purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax, to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenace of good government though this may not be the only criterion of rightful taxation.

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor.. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the pubilc treasury to the importunities of two-thirds of the business men of the city or town."

The case of the State vs. Osawkee Township, 14 Kansas, 418, is an even stronger judicial definition of a private use.

The legislature of Kansas in 1875, after the grasshopper scourge had devastated large portions of the state, entirely destroying the crops, and leaving the farmers without grain for seeding purposes, passed an act authorizing townships to issue bonds for the purpos of procuring grain to be sold to the farmers for seeding purposes, the note given in payment of the grain to be secured by a lien upon the real and personal property owned by the borrower.

In the opinion delivered by Mr. Justice Brewer, then on the Supreme Bench of Kansas, this act was declared to be unconstitutional for the reason that the issuance of bonds might necessitate the levy of taxes, and as taxes can only be levied for public purposes they could not be levied for the purpose of paying these bonds, and that therefore, the bonds could not be issued, and the court held, that while large numbers of farmers were to be affected by, and while great good would result from the legislation, still it would establish a wrong principle, that taxes could not be laid for private uses, and that, therefore, the issuance of the bonds would be enjoined, as will appear from the following paragraph quoted from the opinion of the court: (p. 426.)

"These various provisions show that the idea of the legislature was not the relief of the helpless and dependent, but the assistance of a class temporarily embarrassed. The recipient is required to make oath that he is buying the aid for himself, and not on a speculation. He is to give a note for the amount received, and, if a married man, the note must also be signed by his wife. The note is to bear the same date, and draw the same interest as the bonds, and the interest is payable at the same time as the interest on them. This note is to be a

mortgage as well, and the most sweeping kind of a mortgage, too, embracing all the real and personal property of the maker, whether owned at the time of its execution or subsequently acquired. And, finally, it is made the express duty of the township treasurer to see to the collection of this note, and to take all proper and needful action therefor. Nothing is contemplated but a loan, and a secured loan at that. The credit of the township is invoked to procure funds for the accommodation of a single class temporarily, and through unexpected calamity, embarrassed in the prosecution of its ordinary business. Can this be called a public purpose? Clearly not. It would doubtless relieve the temporary wants of that class, would enable it to enter upon the business of the year with increased hope, and a reasonable expectation of ordinary success in that business, and thus directly result in a great benefit to the general public. But a similar result would follow the success and prosperity of any other class in business. And if the principle be once recognized, in its application to this class, who can tell how soon it may be invoked in aid of another? If one hundred farmers may receive seventy dollars each to assist them in their farming, why may not one hundred mechanics with equal propriety receive seventy dollars each to assist them in their business? Or a single manufacturer, who employs one hundred hands, receive seventy-five hundred dollars to assist him in his manufacturing? A difference in amount makes no difference in the principle."

Lowell vs. Boston, 111 Mass. 454; 15 Am. Reports, 39, sheds further light upon the difference between a public and a private use.

After the great Boston fire in 1872, the legislature authorized the city of Boston to issue bonds in the sum of twenty million dollars, the proceeds to be loaned to facilitate the rebuilding of the city. Suit was brought to restrain the city from issuing these bonds and the question turned upon whether they were being issued for private or public purposes. The court held that while

great good might result from their issuance, while all the inhabitants of the city might be incidentally benefitted by the rebuilding of the city, that the bonds were being used for private and not public purposes; that, therefore, taxes could not be levied to pay them, and that they were void. We quote the following from page 45 of the American Reports:

"The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be effected, nor the degree to which the general advantages of the community, and thus the public welfare may be ultimately benefitted by their promotion."

And we also quote the following from pages 46 and 47:

"The power of the government thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to pur-

poses and objects alone which the government was established to promote, to-wit, public uses and the public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and the mode of exercise, but identical in their source, to-wit, the necessities of organized society; and in the end by which alone the exercises of either can be justified, to wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of those sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. *An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.*

"In the case of a highway, on the other hand, its direct purpose of public use determines conclusively the question in support of the exercise, both of the right of eminent domain and of taxation, however trifling the ad-

vantage to the public compared with that to individuals. The extent or value of the public use, and the wisdom and propriety of the appropriation, are matters to be determined exclusively by the legislature, either directly or by its delegated authority. When the power exists it is not within the province of the court to interfere with its exercise, by any inquiry into its expediency.

"The two instances, above referred to, illustrate the sense in which the furthering of the public good, by the promotion of the interests of many individuals, differs from a public service. A public service may or may not be productive, practically, of public advantage. Resulting advantage to the public does not of itself give to the means by which it is produced the character of a public service."

We call particular attention to that portion of the passage just quoted, saying that, *"An appropriation of money raised by taxation or property taken by right of eminent domain by way of gift to an individual for his own private uses, exclusively, would clearly be an excess of legislative power."*

What is the depositors' guaranty fund except a fund to be held by the State Banking Board, and when called for to be presented as a gift to the depositors of some bank which fails. If the state cannot give away its own money for a private purpose, then it is of course perfectly clear that it cannot compel this plaintiff to give away its money.

Nothing so conclusively demonstrates that this guaranty fund is to be used for private purposes as the fact that it is to be held for the specific purpose of being presented as a gratuity to those persons who have deposited their money unwisely in an unsound bank.

Baltimore & Eastern Shore R. Co. vs. Spring, 89 Md. 510; 27 L. R. A. 72, involved the constitutionality of a statute authorizing county bonds to be issued for the

benefit of an insolvent railroad company upon the condition that claims against the railroad, held by bona fide residents of the county should be first paid. The court held that the purpose of the act was to pay to the inhabitants of the country the indebtedness due them by the insolvent railroad, that this was a private purpose for which taxes could not be laid and that therefore, the issue of the bonds might be enjoined, as is shown by the following, quoted from pages 73 and 74 of the L. R. A.:

"The purpose of this act was not to aid in the construction of the road, because the road was then completed; nor even to pay debts incurred in the construction, for the beneficiaries of the act were all those who being residents of Talbot county held 'Proper and legal claims' against the company, and this included all claims whether incurred by the company in constructing the road or otherwise. That the subscription was to be made to enable the county to discharge an obligation imposed upon it by the requirements of good faith, was, as we have seen, founded upon an assumption, and absolutely false. The conclusion seems to be inevitable that the effect and scope of the act is simply to levy a tax upon the property of the citizens of Talbot county, to pay to certain residents of that county the claims due to them by an insolvent railway company. This is a private purpose, and not one of the objects of taxation. By the Declaration of Rights, article 15, as well as by the fundamental maxims of a free government, taxes can only be imposed to raise money for public purposes. 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.' Cooley Const. Lim. 479. If it be necessary to cite authorities to maintain this thoroughly established principle, the following may be mentioned: Citizens Sav. & Loan Assn. of Cleveland, Ohio, vs. Topeka, 87 U. S. 20 Wall. 655, 22 L. Ed. 455. Cole vs. LaGrange 113 U. S. 1, 28 L. Ed. 896; Cooley, Const. Lim. (488) and authorities there cited; Lowell vs Boston, 111 Mass. 454, 15 Am. Rep. 39; Sharpless vs. Philadelphia, 21 Pa. 168, 59 Wis. 652, 38 Am. Dec. 711; St.

Mary's Industrial School vs. Brown, 45 Md. 335."

In Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S. 103; 17 Sup. Ct. Rep., 130, it was held that a statute of Nebraska which, as construed by the State Supreme Court, required the Railway Company to permit certain persons to construct an elevator on its right of way, amounted to a taking of its property for a private use, and was therefore unconstitutional, notwithstanding the fact that the elevator to be constructed was to be used by the farmers and public of the community.

The following is quoted from page 135 of the Reporter and the opinion, delivered by Mr. Justice Gray, was rendered by a unanimous court:

"To require the railroad company to grant to the petitioner a location on its right of way for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land or of the building to be erected thereon, to the railroad company, for the accommodation of its own business, or for the convenience of the public.

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of the private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another,

is not due process of law, and is a violation of the fourteenth article of amendment to the Constitution of the United States. Wilkinson vs. Leland, 2 Pet. 627, 658; Murray vs. Hoboken Co., 18 How. 272, 276; Loan Assn. vs. Topeka, 20 Wall. 655; Davidson vs. New Orleans, 96 U. S. 97, 102; Cole vs. LaGrange, 113 U. S. 1, 5 Sup. Ct. 416; Fallbrook Dist. vs. Bradley, 164 U. S. 112, 158, 161, 17 Sup. Ct. 56; State vs. Chicago, M. & St. P. Ry. Co., 36 Minn. 402, 31 N. W. 365."

In the case just cited, it seems to us that there was more reason for holding that the property of the railroad was being taken for a public use than there is here. There the owners of the elevator were proposing to construct it for their own benefit and that of the farmers in the neighborhood. The facilities already provided were inadequate. The elevator when constructed would be used in connection with the railroad, in its business of transportation, and provide facilities for shippers, and yet the Supreme Court of the United States by unanimous opinion held that that was a taking for private use.

In the case at bar, the plaintiff's money is taken from it, not to be used for the benefit of the community in which it exists, but to be given as a gratuity to private individuals to whom it owes no duty and in whom it has no interest.

If aiding in the up-building of a city by the inducement of manufacturing enterprises is a private purpose; if raising money to be used in purchasing grain to plant whole sections of a state, is a private purpose; if aiding in the rebuilding of a great city destroyed by an awful calamity, is a private purpose; if aiding an insolvent railroad company to pay its debts to those residing in the county is a private purpose; then certainly this is a private purpose.

To take the property of one person and give it to another, is nothing less than monstrous. A government that compels it is a despotism. If this can be done today by the people for a popular purpose, it can be done tomorrow by a corrupt legislature for an unpopular purpose.

If a vote of the people in the Topeka case could not justify confiscation; if the scourge of the grass-hoppers in Kansas could not justify confiscation, if the horrible losses in the Boston fire could not justify confiscation, then the disordered state of the public mind caused by a financial panic should not justify confiscation.

THIRD AND FOURTH.

It seems to us that we have already gone far enough to demonstrate that the act is unconstitutional, but we desire now to analyze it from another standpoint.

We believe there are only three ways known to the law by which private property can be taken for a public use without the consent of the owner.

We wish to repeat that we think this case is concluded by the previous discussion showing that this is a taking of private property for private use. There is no way known to the law by which private property can be taken for private use without the consent of the owner, and we trust the court will continually bear in mind the fact that this law does take private property for private use without the consent of the owner.

As we have previously said, there are only three ways known to the law by which private property can be taken for a public use without the consent of the owner. These are, first, by eminent domain; second, by taxation; third, by the police power.

This being a taking of private property for private purposes, it of course can not be justified as the exercise of either of the three powers. But let us see whether even if we assume that it is a taking for a public use, it can be justified as the exercise of either.

As it is neither contended by the Attorney General, nor held by either of the lower courts, that the law is attributable to either the power of taxation or eminent domain, we may proceed upon the assumption that no such position will be taken in this court.

FIFTH.

We now come to a consideration of this act as an exercise of the police power.

It is safe to say that under the police power, private property can not be taken for private use without compensation, any more than it can be taken for private use under the exercise of any other inherent governmental power.

In the whole history of our law, the right to the possession of private property has been treated in connection with and as equal to the right to liberty. The enjoyment of life, liberty and property have always been placed side by side, and there has never been a time during the recorded history of the common law when a man's property could be taken from him for private use, without his consent. In the charter demanded from Henry the First, the prohibition against the seizure of private property unless according to the law of the land, was not stated as a new principle, but as the recognition of one as old as the English people, and when, at Runnymeade, the pow-

erful barons required of King John the recognition of this same principle, it was again treated as an existing right, and one that had always existed, and today we invoke the same right, not as something new, but as one as old as the English speaking people and as sacred as the right to life or liberty.

We, with confidence, come into court and say that our property can not be taken from us for private use without our consent, and in support of our claim, we not only refer to the particular decisions cited, but we point to the history of the English speaking people, and of every other race which has a government based on law and not on the sword.

We say that this money, which is demanded by the State Banking Board is our money. That we wish to keep it; that we have the right to keep it; that we have just as much right to keep the Three Hundred now demanded as we have to keep the Ten Thousand not demanded. That if our Three Hundred is taken, we have no protection for our Ten Thousand. That the power to take our Three Hundred involves the power to destroy our existence. Whether it were Three Hundred or Three Thousand, or thirty cents, is wholly immaterial. It is our property and we want to retain it. Whether it be much or little, it is ours, and we say, that neither the State Banking Board nor the State Legislature, nor the state of Oklahoma, nor the Government of the United States, has the right to take from us that which is ours, and give it to someone else.

To hold that this can be done is to rend the structure of the common law, to destroy the protection of the Con-

stitution of the State, and to deny us the rights guaranteed by the Constitution of United States.

It is conceded that this wrong can not be perpetrated under the guise of eminent domain, or the power of taxation, but it is claimed that we can be despoiled of our property, for the benefit of private citizens, under the guise of the police power.

In the face of this claim, which if correct, is most disastrous in its consequences, it behooves us to see what is meant by the police power. It seems to us on principle, that the police power presupposes a policeman, and that a policeman presupposes a valid law. In order for a policeman to act, there must be a law broken. In order that a law may be broken, it must be a constitutional enactment. If unconstitutional it is no law and therefore, no policeman can act upon it. The first inquiry must always be therefore, whether a valid law exists, and this must be determined by ascertaining whether it squares with the constitution. To say that a law which infringes the Constitution is valid as an exercise of the police power, is to say that the police power is superior to the Constitution, and equal to a declaration that there is no Constitution.

If it be ascertained that the law does not conflict with the Constitution, then comes the time to classify it, but before beginning to classify, before thinking of the police power, the fundamental and preliminary question must be decided. Is the law a constitutional exercise of legislative power? If it is not then it is vain to appeal to the police power, because an unconstitutional law can

not be a proper exercise of the police power, or any other power.

We say that the taking of our property in order that it may be given to some other private citizen is unconstitutional. The attorney general says that it is constitutional because it is an exercise of the police power. We say it is not an exercise of the police power or any other power because it is not constitutional. We rest our case upon the supremacy of the Constitution. The attorney general rests his case upon the supremacy of the police power.

We insist that the police power is limited by the Constitution. That the Constitution is the Supreme law of the land and that the police power must yield to it just as every other power must yield to it. We deny that the police power is the supreme law of the land. We deny that the Constitution must yield to the police power. We deny that any law which strikes the Constitution is a law, but when the collision takes place, the Constitution stands firm, and the law, so called, is annihilated.

Usually when analyzed, the police power is traced back to the doctrine:

"Sic utere tuo ut alienum non laedas."

Before referring to the authorities we wish for a moment to call the court's attention to this doctrine and the vast difference between it and the principle involved in the act under consideration. One man must use his own property so as not to injure another, exercising a lawful right. This is a sound moral as well as a legal precept. When one man neglects it, it may be enforced upon him by law. In the absence of statute the courts will enforce

it. But judicial decrees were deemed insufficient to enforce the doctrine and laws were passed compelling those men who did not desire to do so, so to use their own as not to injure that of others. These laws were referred to the police power, and the principle rests upon that ancient doctrine.

The difference between that doctrine and the principle underlying the act of our legislature is this: By that doctrine, limitation was imposed upon the use of property. By the act of the legislature, a new use of property is commanded. So use your own as not to injure another's. The legislative command is, "We take yours to give to the thriftless." This is a wholly different proposition. It is not based on any principle of law, and it is equally antagonistic to every principle of good morals. No thinking man can justify himself, in voluntarily encouraging thriftlessness by unwise donations to the thriftless? Can any thinking man justify legislation which commands the frugal to encourage thriftlessness by compelling them to pay the obligations of the thriftless and dishonest. This may be a new moral doctrine. It certainly is not the old legal doctrine: "So use your own as not to injure another."

We now invite the court's attention to the following authorities which it seems to us conclusively establish the foregoing principles, and demonstrate that this law cannot be justified as an exercise of the police power:

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540
22 Cup. Ct. Rep. 431.

In this case, in an opinion by Mr. Justice Harlan, the court held unconstitutional a statute of the state of Illi-

nois enacting an anti-trust law because from its provisions were exempted "agricultural products or live stock in the hand of the producers or raisers" for the reason that this was a denial of the equal protection of the law guaranteed by the fourteenth amendment of the constitution, and in the opinion the doctrine is laid down squarely that if the effect of a law is to violate any of the guaranties of the constitution of the United States, merely calling it an exercise of the police power will not save it and that under the guise of police powers the provisions of the constitution cannot be nullified.

On pages 438 and 439 of the reporter the doctrine is thus stated:

The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but, if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdictions of the equal protection of the laws, they must be deemed unconstitutional and void. Gibbins vs. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23, 73; Sinnot vs.

Davenport, 22 *How.* 227, 243, 16 *L. Ed.* 243, 247; *Missouri, K. & T. R. Co. vs. Haber*, 169 *U. S.* 613, 626, 42 *L. Ed.* 878, 883, 18 *Sup. Ct. Rep.* 488."

The same doctrine on page 441 is stated with reference to an exercise of the taxing power, in the following language:

"*We must not be understood by what has been said as conceding that the question of a denial of the equal protection of the laws can never arise under the taxing statutes of a state. On the contrary, the power to tax is so far limited that it cannot be used to impair or destroy rights that are given or secured by the supreme law of the land.*"

See also Dobbins vs. Los Angeles 195 U. S. 223, 225 Sup. Ct. Rep. 18, 20. Where Mr. Justice Day quotes approvingly from the case and also from Lawton vs. Steele, 152 U. S. 133 and Holden vs. Hardy 169 U. S. 366.

Gulf C. & S. F. Ry. Co., vs. Ellis, 165 U. S. 158, 41 L. 666 17 S. C. R. 255.

In this case, in the opinion delivered by Mr. Justice Brewer, the Court held that the act of the legislature of Texas requiring railroad companies, failing to promptly pay claims of less than $50.00 for labor, damages, overcharges on freight, or for stock killed, to pay an attorney's fee, was void as depriving such companies of the epual protection of the law.

In the opinion, on page 258 of the supreme court reporter, Justice Brewer expresses the views of the court in the following language:

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while, in cer-

tain cases, there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

Neither can it be sustained as a proper means of enforcing the payment of small debts, and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. *Indeed, the statute arbitrarily singles out one class of debtors, and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special Corporate privileges bestowed by the state. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.*

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews speaking for this court, in Yick Wo vs. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 1071: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary powers.' The

first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

It will be observed that the italicized language was prophetic of the case at bar. The impossibility there assumed has come to pass. The legislature has undertaken to do exactly what Mr. Justice Brewer refers to as an unthinkable legal event.

Minnesota vs. Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862:

This case held that a Minnesota act was unconstitutional which prohibited the sale of dressed meats unless the animal was inspected within twenty-four hours before it was slaughtered, the purpose of the act as expressed in its title, being "For the protection of the public health by providing for inspection, etc."

Mr. Justice Harlan, in delivering the unanimous opinion of the court, very clearly and positively announces the rule that the court would determine for itself whether an act was a proper exercise of the police power, irrespective of the declaration of the legislature to that effect, as

will appear by the following passages quoted from pages 863 and 864 of the reporter:

"The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnent to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the constitution. .In such cases the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void. The principle of constitutional interpretation has been often announced by this court. In Henderson vs. Mayor, etc., 92 U. S. 259, 268, where a statute of New York, imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the court said that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' In People vs. Compagnie Gen. Transatlantique, 107 U. S. 59, 63, 2 Sup. Ct. Rep. 87. where the question was as to the validity of a statute of the same state which was attempted to be supported as an inspection law authorized by Sec. 10, Art. 1 of the Constitution, and was so designated in its title, it was said: 'A state cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease, and to cure the sick, an inspection law, within the constitutional meaning of that word, by calling it so in the title.' So, in Soon Hing vs. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. Rep. 730; 'The rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, are inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as to the purpose they had in view, will always be presumed to be to accomplish that which

follows as the natural and reasonable effect of their enactments.' In Mugler vs. Kans. 123 U. S. 623, 661, 8 Sup. Ct. Rep. 273, the court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, said that the judiciary must obey the constitution, rather than the law making department of the government, and must, upon its responsibility, determine whether, in any particular case, the limits of the constitution have been passed. It was added: 'If, therefore a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.' Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether, by its necessary or natural operation, it impairs or destroys rights secured by the constitution of the United States."

Colon vs. List, 47 N. E. 302: In this case the Court of Appeals of New York in holding unconstitutional a statute providing that any vessel used in violation of the fisheries law of the state, might be seized and, after proceedings before a justice of the peace, sold, the proceeds being paid to the commissioners of fisheries, violated both the State and Federal Constitutions, used the following language:

"By virtue of what power can the legislature enact a statute forfeiting to the state the property of one person upon the sole ground that he had in some manner interfered with the private rights of another, is an inquiry which at once presents itself. Such an act would seem to be in clear violation of the provisions of both the federal and state constitutions, which insure to every person his life, liberty, and property, unless deprived of them through the regular and proper administration of the law, according to the rules and forms which have been established for the protection of private rights or the punishment or prevention of public wrongs. The legislature is not vested

with the power to arbitrarily provide that any procedure it may choose to declare such shall be regarded as due process of law. If it possessed that power, the guaranties of the constitution would be rendered unavailing, and private rights of citizens would be within its absolute control. If authority to enact the statute under consideration existed, it was by virtue of the police power vested in the legislature. Under that power, persons and property may be subjected to the necessary restraints and burdens to secure the general public good. That that power exists is undenied. That it is necessary to the proper maintainance of the government of the state and the general welfare of the community must also be admitted. Although it includes everything essential to the safety, health, morals and general good of the public, it is by no means unlimited. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public, generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Lawton vs. Steele 152 U. S. 133, 137, 14 Sup. Ct. 499. It is within the province of the legislature to determine what laws are needed for the protection of the public, and, so long as its measures are calculated and appropriate to accomplish that end, its discretion may not be reviewed by the courts. They must however, have some relation to that end; and, if they do not really relate to such a purpose, it becomes the duty of the courts to declare them invalid. In re Jacobs, 88 N. Y. 88. It is for the judiciary to see that the purpose to be reached by the law is a public one. In re Ryers, 72 N. Y. 1, 8. Equal rights and impartial tribunals to enforce them are the results which are intended to be secured by the establishment of constitutional limitations to legislative power. People vs. Marx, 98 N. Y. 377, 387, 2 N. E. 29. UNDER THE MERE GUISE OF A

STATUTE TO PROTECT AGAINST WRONG. THE LEGISLATURE CAN NOT ARBITRARILY STRIKE DOWN PRIVATE RIGHTS, AND INVADE PERSONAL FREEDOM, OR CONFISCATE PRIVATE PROPERTY. The police power must be exercised within its appropriate sphere, and by appropriate methods. People vs Arensberg, 103 N. Y. 399, 8 N. E. 736. This power can be exercised only to promote the public good, and is always subject to judicial scrutiny. Forster vs. Scott 136 N. Y. 577, 584, 32 N. E. 976. Whenever the legislature passes an act which transcends the limits of the police power, it is the duty of the judiciary to pronounce it invalid, and to nullify the legislative attempt to invade the citizens' rights. People vs. Warden of City Prison, 144 N. Y. 529, 535, 39 N. E. 686. That power must be exercised subject to the provisions of both the federal and state constitution. Laws passed in the exercise of it must tend toward the preservation of the lives, health, morals, or welfare of the community, and the courts must be enabled to see some clear and real connection between the assumed purpose of the law and the actual provisions thereof, and that the latter tend in some plain and appreciable manner towards the accomplishment of the objects for which the legislature may use this power. Health Department of City of New York vs. Rector, etc., of Trinity church, 145 N. Y., 32, 39, 39 N. E. 833.

'The question here to be determined is whether the enactment of the statute we are considering was a proper exercise of the police power. When we submit this statute to the test of the principles established by the cases already cited, to which many others might be added, it becomes obvious that it cannot be upheld upon the ground that it is within the police power of the state. It is to be observed *that the statute does not relate to the health, morals, safety or welfare of the public, but only to the private interests of a particular class of individuals. Nor can it be fairly said that the means provided for the protection of those interests are reasonably necessary to accomplish that purpose. But, on the contrary, they are plainly oppressive, and amount to an authorized confiscation of private property for the mere protection of private rights. It is in no manner attempted by this statute to protect*

any public interest, or defend any public right. Nor is it calculated to accomplish that end, but, under the guise of a pretended police regulation, it arbitrarily invades personal rights and private property. IN THIS CASE, WE HAVE A STATUTE WHICH AUTHORIZES THE SEIZURE, SALE AND COMPLETE APPROPRIATION BY THE STATE OF THE PROPERTY OF AN INDIVIDUAL WHICH MAY REACH IN VALUE MANY THOUSANDS OF DOLLARS. IT IS MANIFEST THAT THIS EXTRAORDINARY AND EXTREME STATUTE IS NOT NECESSARY, AND WAS NOT INTENDED FOR THE PROTECTION OF THE PUBLIC. ITS SOLE PURPOSE WAS TO REGULATE PRIVATE INTERESTS, AND ENFORCE PRIVATE RIGHTS. In no sense can it be regarded as a police law, and consequently, is not within the police power. In this statute we have another example of class legislation, where the legislature has attempted to improperly interfere with the private rights of the citizen. This species of legislation has been often condemned by this and other courts as to render any further discussion of its impropriety and invalidity wholly unnecessary. In re Jacobs, 98 N. Y. 98; People vs. Marx, 99 N. Y. 377, 2 M. E. 29; People vs. Arensberg, 103 N. Y. 388; 8 N. E. 736; People vs. Gillson, 109 N. Y. 389, 17 N. E. 343; Forster vs. Scott, 136 N. Y. 577; 32 N. E. 976."

A. T. & S. F. Ry. Co. vs. Campbell, 61 Kansas 438; 48 L. R. A. 251. In this case the Supreme Court of Kansas held unconstitutional an act of the legislature requiring railroads to furnish free transportation to persons shipping stock in certain cases. Chief Justice Doster in delivering the opinion forcibly presents the view of the court in the following language:

"Upon the theory whatever, consistent with the idea that the franchise of railroad companies to take tolls is a species of property, or consistent with the adjudications of the courts that such right of property is protected by the 14th amendment to the Federal Constitution, can such an enactment be upheld. Once grant that so much of the

property of railroad companies as is involved in their right to charge passenger fare to shippers of stock can be taken away by legislative enactment, and it necessarily follows that the like property of theirs which consists in their right to charge passenger fare to other shippers of other kinds of property can also be taken away for like reasons; and once grant, upon like considerations, that the property right of railroad companies to take tolls for passenger carriage can be thus taken away,and the right to take tolls for freight transportation can be likewise taken away; and once grant that the right to take tolls for freight and passenger carriage can be taken away, and it follows that the right to own and possess the rolling stock and other like property necessary to the operation of the road can likewise be taken away. In short, there must be no end to the extension of legislative authority over the right of railroad companies to own and enjoy property. It would be no answer to say that the enforcement of the act in question would not sufficiently impair the property right of the companies to take tolls as to be substantially determined to their interest. RIGHTS ARE NOT MEASURED OR ASCERTAINED BY THE EXTENT OF THE INJURY RESULTING FROM THEIR IMPAIRMENT OR DENIAL. THEY DO NOT CEASE TO EXIST MERELY BECAUSE THE HURT TO THEM MAY BE SLIGHT. RIGHTS RESIDE IN PRINCIPLES, AND NOT IN THE PHYSICAL ABILITY OF THE CLAIMANT OF RIGHTS TO DO WITHOUT A MINOR PORTION OF THEM.

"Again speaking for myself, I am a firm believer in the right of the legislature of this state, under the reserved power of the Constitution (Art. 12, 1), to amend or add to the original acts providing for the incorporation of companies to amend or add to the original body of laws governing them without declaring its enactments to be amendatory in character. However, its power of amendment in such cases is limited to such enactments as do not substantially impair the vested rights of the corporation. 7 Am. & Eng. Enc. Law, 2d Ed. p. 675. I therefore agree with my associates that the act in question, even if to

be regarded as an exercise of the reserved power of this legislature to amend the charter of railroad corporations, is a substantial impairment of their vested rights."

Lawton vs. Steele, 152 U. S. 133, 14 Sup. Ct. Rep. 489.

This is a case involving the constitutionality of a New York law prohibiting fishing with nets in certain places and providing that when nets were used in the prohibited places they thereby became public nuisances and the game wardens were given power to summarily destroy them. Pursuant to the act Steele, as game-warden, destroyed Lawton's nets, and Lawton brought suit for damages. The court upheld the law upon the theory that the legislature possessed the power to make the use of nets in the prohibited way a criminal offense, and that as the value of the nets was small (only $15) they could thus be summarily destroyed.

Mr. Justice Brown delivering, the opinion of the court, very clearly states the extent and limits of the police power in the following language, quoted from pages 500 and 501 of the Supreme Court Reporter:

"The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the

regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interest of the public require, but whatever measures are necessary for the protection of such interests. Barber vs. Connolly, 113 U. S. 27, 5 Sup. Ct. 357; Kidd vs. Pearson, 128 U. S. 1, 9 Sup. Ct. 6. *To justify the state in thus interposing its authority in behalf of the public, it must appear first that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.* Thus, in an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger, and the owner of such vessel to give bond for every passenger so reported, conditioned to indemnify the state against any expense for the support of the person named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of congress to regulate commerce with foreign nations. Henderson v. Mayor, 92 U. S. 259. A similar statute of California, requiring a bond for certain class of passengers described, among which were 'lewd and debauched' women, was also held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to

California altogether, and was held to invade the right of congress. Chy Lung v. Freeman, 92 U. S. 275 So. In Railroad Co. v. Husen, 95 U. S. 465, a statute of Missouri which prohibited the driving of Texas, Mexican or Indian cattle into the state between certain dates in each year was held to be in conflict with the commerce clause of the constitution, and not a legitimate exercise of the police powers of the state, though it was admitted that the state might, for its self protection, prevent persons or animals having contagious diseases from entering its territory. In Rockwell v. Nearing, 35 N. Y. 302, an act of the legislature of New York which authorized the seizure and sale, without judicial process, of all animals found trespassing within private inclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See, also, Austin v. Murray, 16 Pick. 121; Watertown v. Mayo, 109 Mass. 315; Slaughterhouse Cases, 16 Wall. 36; In re Cheesebrough, 78 N. Y. 232; Brown v. Perkins, 12 Gray, 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer, dissenting, stated their views in a very short opinion, written by the Chief Justice, to which we invite careful attention. (pp. 503 and 504 of the Sup. Ct. Rpt.)

"In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing nets and prohibits any action for damages on account of such destruction, is unconstitutional.

"Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a state the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on the ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

"The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

"It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that the argument is to be deprecated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guaranties."

The Hannibal and St. Joseph Railroad Co. vs. Husen, 95 U. S. 465, 24 L. Ed 527.

In delivering the opinion of the Court holding that a Missouri statute prohibiting the importation of Texas or Indian cattle into the State between March 1st and December 1st was unconstitutional, Mr. Justice Strong in discussing the meaning of the police power uses the following language:

"We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is it is dificult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. As was said

in Thorp, v. R. R. Co., 27 Vt., 149, 'It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said, that, by the general police power of a state, 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.' It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. Under it, a state may legislate to prevent the spread of crime or pauperism or disturbances of the peace. It may exclude from its limits, convicts, paupers, idiots and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases; a right founded, as intimated in the passenger cases, 7 How., 283, by Grier, J., in the sacred law of self-defense. Vide, Neff v. Penoyer, 3 Sawyer, 283. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having infectious or contagious diseases. All these exertions of power are in immediate connection with the protection of persons and property against the noxious acts of other persons, or such a use of property as is injurious to the property of others. They are defensive.

"*But whatever may be the nature and reach of the police power of a state, it can not be exercised over a subject confided exclusively to congress by the Federal Constitution. It can not invade the domain of the National Government. It was said in Henderson vs. Mayor of N. Y. Supra, to 'Be clear fro mthe nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely*

allied it may be to powers conceded to belong to the states.' Substantially the same thing was said by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat., 1. Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution."

Chicago, Burlington & Quincy Railway Company vs. Ill., 200 U. S. 561 Sup. Ct. Rep. 341.

In this case, by a divided court, a statute of the state of Illinois was held to be constitutional which required railway companies to bear the expense occasioned by enlarging the openings under their tracks, where they crossed natural water courses where the flow of water was increased for drainage purposes.

The majority of the court held that this was incidental injury and not a taking of the property of the railroad. In the majority opinion, delivered by Mr. Justice Harlan, the following passage is found on page 350 of the Supreme Court Reporter:

"Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals, or the public safety any more than under a police regulation having no relation to such matters, but only to the general welfare."

And again on the same page:

"The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner.

"Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 659, 34 L. Ed. 188, 196, 197, 16 Supt. Ct. Rep. 43; Monogahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. Ed 463, 471, 13 Sup. Ct. Rep. 622; United States v. Lynah, 188 U. S. 445, 47 L. Ed. 539, 23 Sup. Ct. Rep. 349.

"If the means employed have no real, substantial relation to public objects which government may legally accomplish—if they are arbitrary and unreasonable, beyond the necessities of the case—the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such legal action. The authority of the courts to interfere in such cases is beyond all doubt. Minnesota v. Barber, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the constitution, a "taking" of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the constitution. Such is the present case. There are unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given.' Sedgw. Stat. & Const. Law, 434."

We also quote the following from Mr. Justice Brewer's dissenting opinion:

"If it be a principle of natural justice that private property shall not be taken for public purposes without just compensation, is it not equally a principle of natural

justice that no man shall be compelled to pay out money for the benefit of the public without any reciprocal compensation? What difference in equity does it make whether a piece of land is taken for private use or so many dollars for like purposes? Cary Library v. Bliss, 151 Mass., 364, 378, 379; 7 L. R. A. 765, 25 N. E. 902; Woodward v. Central Vermont R. Co., 180 Mass. 599, 603, 62 N. E. 1051.

But it is said that this is done under the police power of the state, and that that can be exercised without any provision for compensation. It seems to me that the police power has become the refuge of every grievous wrong upon private property. Whenever any unjust burden is cast upon the owner of private property which can not be supported under the power of eminent domain or that of taxation, it is referred to the police power. .But no exercise of the police power can disregard the constitutinal guaranties in respect to the taking of private property, due process, and equal protection, nor should it override the demands of natural justice. .The question in the case is not how far the state may go in compelling a railroad company to expend money in increasing its facilities for transportation, but how far it can go in charging upon the company in the cost of improving farms along the line of its road."

Adair vs. U. S., 208 U. S. 161 28 Sup. Ct. Rep. 277.

This is the most recent expression of the Supreme Court of the United States upon the police power, and is an opinion handed down on January 27, 1908.

The court held unconstitutional a statute making it a criminal offense for an agent or an officer of an interstate carrier to discharge an employe because of membership in a labor union, and we quote the following language from the opinion of Mr. Justice Harlan, on page 280 of the Reporter:

"While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government .....at least, in the absence of contract between the parties.....to compel any person, in the course of his business and against his will, to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant, Adair.....however unwise such a course might have been.....to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so..... however unwise such a course on his part might have been .....to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land. These views find support in adjudged cases, some of which are cited in the margin."

We respectfully submit that the foregoing authorities establish:

FIRST. THAT THE TAKING OF PRIVATE PROPERTY FOR PRIVATE USE CANNOT BE DEFENDED AS AN EXERCISE OF THE POLICE POWER;

SECOND. THAT CLASSIFYING AN ACT AS AN EXERCISE OF THE POLICE POWER, DOES NOT

PREVENT ITS DESTRUCTION WHEN IT TRESPASSES UPON THE SACRED PRECINCTS OF THE CONSTITUTION; AND;

THIRD. THAT, EVEN IF PROPERTY IS TAKEN FOR A PUBLIC USE THE POLICE OR ANY OTHER POWER, IT IS ABSOLUTELY NECESSARY THAT COMPENSATION BE MADE.

IN THE CASE AT BAR THE BANK'S MONEY IS TAKEN. IT IS TAKEN EITHER FOR PRIVATE USE OR FOR PUBLIC USE. IF TAKEN FOR PRIVATE USE, THE ACT IS VOID BECAUSE "DUE PROCESS OF LAW" DOES NOT PERMIT THE TAKING OF PRIVATE PROPERTY FOR PRIVATE USE. IF TAKEN FOR PUBLIC USE, THE ACT IS VOID BECAUSE "DUE PROCESS OF LAW" DOES NOT PERMIT THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

SIXTH.

The fourteenth amendment of the constitution of the United States contains the proviso: "Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

Bearing in mind that the effect of this law is to take the property of the plaintiff for the purpose of making a donation to private citizens, and that it can not be justified as either right of eminent domain, the power of taxation, or a police regulation, it is, of course, apparent that it is not the due process of law.

It is legislative taking. This is never due process of law.

It is the taking of private property for a private use without the owner's consent. This is never due process of law.

It is a stautory declaration that the property of the plaintiff becomes the property of the State Banking Board and a part of the Depositors' Guaranty Fund. This is never due process of law.

In addition to the authorities heretofore quoted, which are sufficient to establish this question, we call attention to the following:

Holden vs. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383.

Lake Shore & M. S. Ry. Co. vs. Smith, 173 U. S. 684, 19 Sup. Ct. Rep. 565.

Attorney General vs. B. & A. R. Co. (Mass.) 35 N. E. 252.

Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S. 403.

Davidson vs. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

And quote the description of "due process of law" from Mr. Justice Brown's opinion in Holden vs. Hardy.

"This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice, which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice, and an opportunity of being heard in his defense. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in Murray's Lessees v. Land Co., 18

How. 272, 276, as anywhere. He said: "The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and can not be so construed as to leave congress free to make any process 'due process of law' by its mere will. To what principle, then, are we to resort to ascertain whether this process enacted by congress is due process? To this the answer must be two-fold: We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of this country.

"It was said by Mr. Justice Miller, in delivering the opinion of this court in Davidson v. New Orleans, 96 U. S. 97, that the words 'law of the land' as used in Magna Charta, implied a conformity with the 'ancient and customary laws of the English people,' and that it was wiser to ascertain their intent and application by the 'gradual process of judicial inclusion and exclusion as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' Recognizing the difficulty in defining with exactness the phrase, 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

In Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S. 403; 17 Sup. Ct. Rep. 135, the Court, in an opinion delivered by Mr. Justice Gray and previously quoted in this brief,

specifically announce the rule that the taking of private property for a private use without the owners consent is not due process of law, and we again quote the following from that opinion:

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of the private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the Constitution of the United States. Wilkinson vs. Leland, 2 Pet. 627, 658; Murray vs. Hoboken Co., 18 How. 272, 276; Loan Assn. vs. Topeka, 20 Wall. 655; Davidson vs. New Orleans, 96 U. S. 97, 102; Cole vs. LaGrange, 113 U. S. 1, 5 Sup. Ct. 416; Fallbrook Dist. vs. Bradley, 164 U. S. 112, 158, 161, 17 Sup. Ct. 56; State vs. Chicago, M. & St. P. Ry. Co., 36 Minn. 402, 31 N. W. 365."

In the case of Davidson vs. New Orleans, 96 U. S. 97; 24 Law. Ed. 616, Mr. Justice Miller in delivering the opinion of the court holds that the taking of private property for private use is not due process of law, in the following language commencing on page 618 of the Lawyers Edition:

"It is easy to see that when the great Barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those Barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace, 1866, there is placed in the Constitution of the United

States a declaration that 'No State shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the State is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. It seems to us that a statute which declared in terms, and without more, that the full and exclusive title of a described piece of land which is now in A, shall be and is hereby vested in B, would, if effectual, deprive A of his property without due process of law within the meaning of the constintional provision."

It is sought, however, to avoid the force of this reasoning by the claim that the banking business is a public business and therefore subject to regulation by the public and that this is a law merely regulating banks.

It may be conceded that the banking business, in so far as it involves the issue of paper to circulate as money, is a public business, but whether the banking business is a public business within the meaning of Munn vs. Illinois, 94 U. S. 113, for instance, or in the sense that a railroad is a public business, may well be doubted.

We do not think it is a question of importance in this case, and therefore shall not enter into a discussion of a matter we regard as merely academic.

If, however, the court deems it a question of interest, we refer to the case of the State of Indiana vs. Rich Creek, 77 N. E. 1085, 5 L. R. A. (N. S.) 874. On pages 874 to 877 of 5 L. R. A. (N. S.) may be found a note referring to the cases on this subject.

As previously stated, we do not regard the question as of more than academic importance, and we may therefore proceed to a consideration of this law as a regulation

of the banking business upon the theory that the legislature has the right to regulate such business.

In respect of the relation between the state and property which is subject to a public use, the general principles of law are thoroughly settled.

When the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.

Munn vs. Illinois, 94 U. S. 113—126 to 130; 24 Lawyer's Ed. 77.

Budd vs. New York, 143 U. S. 547, 12 Sup. Ct. Rep. 477, 36 Lawyer's Ed. 256.

It is equally well settled, that while the state has the power to regulate the use of such property, that this power is not unlimited. It is a power to regulate and not a power to destroy; not a power to take, but to regulate.

The doctrine laid down in Munn vs. Illinois, that this power to regulate, once conceded to exist, thereupon becomes subject to legislative discretion, which can not be reviewed by the courts, was subsequently modified so that it may now be stated as definitely and finally settled that while it is true that the power of the legislature to regulate property affected by a public use unquestionably exists, yet it is equally true that the extent of this regulation is limited, that the action of the legislature is always subject to review by the courts, and that the right to regulate must stop short of an infringement of any of the constitutional guaranties protecting the ownership and enjoyment of private property.

Chicago, etc., Railroad Co., vs. Munn, 134 U. S. 461, 10 Sup. Ct. Rep. 703, 33 Lawyer's Ed. 983.

Stone vs. Farmers Loan & Trust Co., 116 U. S. 331. 6 Sup. Ct. Rep. 344, 29 Lawyers' Ed. 644.

Ragan vs. Farmers Loan & Trust Co., 154 U. S. 397.

Interstate Comm. Com. vs. Railway Co., 167 U. S. 500, 17 Sup. Ct. Rep. 900, 42 Lawyer's Ed. 253.

Smith vs. Ames, 169 U. S. 466, 18 Sup. Ct. Rep. 418.

St. Louis, etc., R. Co. vs. Gill, 156 U. S. 649, 15 Sup. Ct. Rep. 485.

Covington, etc., Co. vs. Sandrant 164, U. S. 758. 17 Sup. Ct. Rep. 198, 41 Lawyers' Ed. 560.

Lake Shore R. Co. vs. Smith, 173 U. S. 696, 19 Sup. Ct. Rep. 570.

The development of these doctrines, defining the right of regulation and its limitations are very clearly stated in the note to Munn vs. Illinois, found in the 9th volume of Rose's Notes on U. S. Reports, pages 21 to 55, to which we respectfully invite the attention of the court.

The limitation upon the power of regulation is very clearly illustrated in:

Attorney General vs. Boston and A. R. Co. (Mass.) 35 N. E. 252.

A. T. & S. F. R. Co. vs. Campbell, 61 Kan. 439, 48 L. R. A. 251.

Mays vs. Seaboard Air Line Ry (S. C.) 56 S. E. 30.

Mo. Pac. Ry. Co. vs. Nebraska, 164 U. S. 403, 17 Sup. Ct. Rep. 135.

In Attorney General vs. Boston & A. R. Co., the syllabus is as follows:

"St. 1892, c. 389, requiring a railroad company to sell 1,000 mile passenger tickets for $20, to redeem such tickets on presentation by any other company, and to accept for

fare over its own lines all such tickets issued by any railroad company operating within the state, is unconstitutional, as authorizing one railroad to determine the conditions on which another railroad must carry passengers, and as compelling one railroad to carry passengers on the credit of another; thus appropriating individual property to the public without the owner's consent."

The following passages are quoted from the opinion of the court on page 258 of the Reporter:

"The objection that the statute authorizes one railroad to make conditions concerning the transportation of passengers which must be performed by other railroads also seems to us valid."

And again: "One railroad is in effect, authorized to make a contract for another, but the railroads are not in fact, the agents of each other in issuing these tickets. It has been often said that the legislature can not make a contract between two or more persons which they do not choose to make although it may sometimes impose duties which can be enforced as if they arose from contract."

In the Campbell case, supra, the Supreme Court of Kansas held unconstitutional an act requiring railroads to furnish certain free transportation to shippers of live stock. We have previously quoted from this opinion and again call attention to it because of the principle it establishes. Railroads, of course, are engaged in a public business and are subject to regulation, but compelling them to carry a passenger free, is not regulation, but confiscation. If a railroad cannot be compelled to contribute passage to a shipper over its own line, it seems clear that a bank cannot be compelled to contribute money to pay a depositor of some other bank.

The case of Mays vs. Seaboard Air Line Ry., Supra, holds that an act of the legislature of South Carolina requiring railroad companies to build side tracks connecting industrial enterprises with their main lines for the delivery and receipt of freight, the cost of such side tracks to be paid by the industry in annual installments of twenty per cent of the freight collected, is a violation of the fourteenth amendment in that it authorizes the taking of private property for private use, and therefore, can not be supported as a regulation of public carriers.

If a railroad company cannot be compelled to build a side track for its own customer at the expense of that customer, then it would seem clear that a bank cannot be compelled at its own expense to pay the depositors of some other bank, to whom it is in no way related.

In Cotting vs. Goddard, 183 U. S. 79, 22 Sup. Ct. 30., in an elaborate opinion declaring unconstitutional a statute of Kansas, limiting the amount of charges to be made by Stock Yards Companies, Mr. Justice Brewer, in delivering the opinion of the court, examines elaborately the doctrine of regulation of public business, and cites many authorities holding that, while a public business may be regulated, the state can not under the guise of regulation take its property without compensation.

Reagan et al. vs. Farmers' Loan & Trust Co. et al., 154 U. S. 362, 14 Sup. Ct. Rep. 1047; directly involves the extent to which a state can go in regulating the property of corporations exercising a public function.

In the case at bar it is contended by the Attorney General that as banks exercise a public function they are subject to regulation and that the state, in the exercise

of its power to regulate, can constitutionally pass this compulsory guaranty law. For the sake of argument we may concede the Attorney General's premise and yet we do not reach his conclusion, as the power to regulate can never be exercised in such a way as to take the property of the corporation regulated without due process of law and without compensation. These principles are very clearly stated in the Reagan case by Mr. Justice Brewer at page 1055 of the Reporter:

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. *The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that under such a government, with its constitutional limitations and guarantics, the forms of law and the machinery of government, with all their reach and power, must in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held.*"

This destroys the whole basis of the contention that this compulsory levy upon the plaintiff is a regulation of its business.

What is the regulation of the banking business? Prescribing rules according to which the business should be conducted.

Does this law prescribe a rule to govern the conduct of the banking business, or does it simply appropriate for the private use of other people a part and possibly all of plaintiff's property?

As stated time and time again by the supreme court of the United States in those cases which consider the power to regulate railroad rates, the power to regulate is not the power to destroy.

This compulsory taking of plaintiff's property, involving the power to destroy it, is not regulation.

This act does not regulate the business of plaintiff but compels the plaintiff to pay the debts of some other bank.

But it is argued that the business of a bank is receiving deposits and that this is a public business and subject to regulation; that the public business of a railroad is transportation which is subject to regulation; that the public business of elevators is storing grain, which is subject to regulation; that the public business of gas and electric companies is supplying gas and electricity, which is subject to regulation.

The learned judge of the trial court took this view and held, for that reason, that the act is valid.

Upon first statement this reasoning sounds plausible, but it will not in any way bear the test of analysis.

In all cases of property of public service corporations it must be remembered that there is a distinction between their public duty and their private property.

Mays vs. Seaboard Air Line Ry. (S. C.) 56 S. E. 30.

A railroad company, for instance, may have a surplus of cash which, under its charter, it is authorized to invest. The state, exercising its right to regulate the business of transportation, could not say to the railroad company this money should not be loaned. Transportation is a public business; the lending of money is a private business. All the railroads, in addition to their transportation lines, might have a surplus of money which might be loaned. The state, because it has the right to regulate transportation, could not pass a law providing that in the event one railroad in the loan of its private funds sustained a loss that this loss should be met by the other railroads. That would be an interference with the private business of the roads and a taking of their money without due process of law.

Under a like state of facts, the state could not pass a law requiring the roads in time of prosperity to deposit with the state half of their surplus cash in order to create a fund to be used for the purpose of protecting a weak road in time of adversity. Such a law would not regulate the business of transportation, but would be a taking of the property of the strong roads to help the weak.

That is our banking law.

This law does not regulate the manner of receiving deposits; it does not regulate the manner of investing deposits; it does not regulate the character of the security which shall be taken or the kind of men who shall engage in the business. Other features of the law may do these things and as to those we do not complain, but this feature of the law bears no relation to the public business at all,

bears no relation to the receiving of deposits, to the making of loans, to the conduct of the business; but it takes the property of the plaintiff for the purpose of paying it over to the depositors of some bank which has failed and which therefore has ceased to be a subject of regulation.

The state in the exercise of its right to regulate railroad rates cannot pass a law which takes any of the railroad's property.

Reagan vs. Farmers' Loan & Trust Co., supra.

It cannot, as a regulation of transportation, pass a law which will compel one railroad to accept for transportation a mileage ticket issued by another railroad.

Attorney General vs. B. & A. R. Co., supra (Mass.) 35 N. E. 252.

That is certainly more nearly a regulation of transportation than the act under consideration is a regulation of the banking business and yet in the Massachusetts statute payment by the road issuing the ticket to the road furnishing the transportation was required, while in the bank act plaintiff's money once paid into the Guarantee fund is gone forever. There is no provision of law for its ever being returned by any person.

The state cannot, as a regulation of transportation, compel a railroad to furnish free transportation to shippers of live stock.

A. T. & S. F. vs. Campbell, supra.

The state cannot, as a regulation of transportation, compel a railroad to build an industrial track at the expense of the industry served.

Mays vs. Seaboard Air Line Ry., supra.

The state cannot, as a regulation of transportation, compel a railroad to permit private individuals to build an elevator for shipping purposes on its right-of-way.

Mo. Pac. Ry. vs. Nebraska, 164 U. S. supra.

It seems clear, therefore that the state cannot, as a regulation of the banking business, compel one bank to pay the debts of another bank.

The cases from Munn vs. Illinois to the present day clearly establish that the state cannot under the guise of regulation take the property of citizens.

In support of his theory the Attorney General relies upon such cases as C. C. & R. Co. vs. Gibbs, 142 U. S. 386.

That was a case in which the railroads of South Carolina were required by statute to pay the expenses of the railroad commission of the state and the holding was based upon the theory that it was proper police regulation.

The case is easily differentiated from the case at bar in several different ways.

The statute in that case, was a mere regulation of the business of transportation. It created a corporation commission. It required that commission to see that the railroads discharged their public functions. In the event of their failure so to do this commission was required to institute proceedings in the courts to compel them to do so. These commissioners were charged with the duties of a railway police. The whole law was purely a police regulation and their services being rendered in connection with the railroads and being made necessary by the conduct of the railroads, it was held that the roads as a mere

incident to the creation of the law could be required to pay the expenses of the commissioners.

In the next place, that charge upon the railroads was made for a public purpose and not for a private purpose. The money raised by the tax so levied upon them was used for government purposes. It was not paid to private individuals but it was paid to state officials to aid them in the performance of their functions as officers. It was not one railroad paying the debts of another railroad, but it was one railroad paying a tax to enable the public to perform a governmental function made necessary by the road itself. It falls within the same reasoning which permits the banks to be charged a small fee for an examination by the bank commissioner.

In the case at bar the money is not paid to any government officers, it is not paid in the discharge of any government function but it is taken from the plaintiff and bodily turned over to a small group of individuals who are in no way connected with the state, who have no public functions to perform and who are purely private citizens.

In the third place, the money raised by the South Carolina law was for a public purpose for which a tax could rightfully have been levied upon all the people of the state. As the railroads were the citizens especially affected by it, it was valid to lay it upon them, just as a paving tax is laid upon the adjoining property although all the public are benefitted by it.

We undertake in this brief to predict that no case will be found where a charge is made upon a public service corporation which is not made for a public use and in connection with its duties to the public.

The Depositors' Guaranty Fund provided by the act under consideration could not be raised by the levy of a tax because it would be a tax for a private purpose.

In the Gibbs case the money levied upon the railroads could have been raised by a tax upon the people, because it was for a public purpose, just as the expenses of our own corporation commission or our own supreme courtor our own Governor are met by a tax upon the people of the state.

Where a fund is to be raised which cannot be levied as a tax upon all the people of the state it is perfectly plain that it cannot be raised by a levy upon a part of the people of the state.

We repeat that this assessment upon the plaintiff is not in regulation of its business nor is it in the regulation of the banking business, but it is a taking of plaintiff's property for the private benefit of the depositors of some bank which has passed beyond the pale of regulation.

Regulation deals with going concerns.

This act is for the benefit of dead ones.

SEVENTH.

We have now reached the point where an orderly and logical analysis of the law raises the question first considered in the opinion of the Oklahoma Supreme Court, viz., whether this act impairs the obligation of a contract.

We do not regard this as a vital question in the case. If, fundamentally, this law is a taking of private property

for private use it is unconstitutional because not conforming to the requirements of due process of law. To hold that it is also unconstitutional as impairing the obligation of a contract is simply to make its condemnation doubly sure.

There is, however, a most radical distinction between holding that this law does not impair the obligation of a contract and justifying it as an amendment of a charter of a corporation.

We will take up these two questions in order and first, will consider whether the law impairs the obligation of a contract.

The plaintiff in error was incorporated under the laws of the Territory of Oklahoma which provided, that:

"The share holders of every bank organized under this act shall be additionally liable for the amount of stock owned and no more." 1 Wilsons Ann. Stat. Sec. 252.

The law then in force did not in any way provide that one bank should be liable for the debts of another bank but it did provide:

"Every grant of corporate power is subject to alteration, suspension or repeal in the discretion of the legislature." 1 Wilson 932.

The constitution of Oklahoma, Article 9 Section 47 (Bunn's Ed. Sec. 262), provides that:

"The legislature shall have power to alter, amend, annul, revoke or repeal any character of a corporation or franchise now existing and subject to be altered, amended, annulled, revoked or repealed at the time of the adoption of this constitution, or any that may be hereafter created, whenever in its opition, it may be injurious to the citizens of this State in such manner however, that no injustice shall be done to the incorporators."

The Constitution of the United States provides (Sec. 10 of Art. 1) that no state shall pass any law "impairing the obligation of contracts."

That the organization of the plaintiff in error under the laws of the Territory of Oklahoma created a contract between it and the Territory, is, of course, not open to controversy.

That this act of the Legislature of the State of Oklahoma changes that contract by increasing the liability of the share holders of the bank and by making the bank liable for the debts of other banks is equally beyond controversy.

That this change works an injury upon the stockholders of the plaintiff in error is equally beyond controversy.

It is therefore plain that the law impairs the obligation of the contract.

It is sought by the Supreme Court to justify this impairment as an amendment of the charter.

This brings us to the second subdivision of this question, viz., whether under the guise of amending the charter of a corporation the state can violate the constitutional right to the possession and enjoyment of its property.

The Supreme Court takes the position:

"The Legislature was authorized to unconditionally repeal such charter and to make provision for the winding up of its affairs. It is not compulsory upon the stockholders to continue in the banking business. If they do not see proper to comply with the laws of the state, and to conduct the business of the bank in accordance therewith, it has the option to wind up its affairs, pay its depositors, and discontinue business."

It will be noted that the act of the legislature does not repeal the charters of banks, but simply requires them to underwrite each others deposits to an unlimited extent.

It does not, therefore, declare the business of banking to be inujrious to the public, thereby justifying the extinction of the banking business, but, recognizing the necessity of banks, it simply requires them to pay each others debts.

It is true that a bank can discontinue business whenever it likes, but does its right to do so, justify the State in saying to it, you must either discontinue business or surrender your asset for private use of other people.

Any citizen has the right to abandon the State, but would this right justify the Legislature in passing a law which could confiscate his property unless he did abandon the State?

We do not believe that the power of the State to repeal a charter is arbitrary, but that it exists along side of and in connection with the guaranties of the Constitution.

If the power to amend and repeal is arbitrary and unconditional, then persons investing in corporations have no protection whatever except the mere whim of the Legislature; and the State is not bound by any Constitutional limitations in dealing with the property of corporations.

It seems to us that the true meaning is that the state, after chartering a corporation, can amend the charter, or repeal it, provided, however, that such amendment or repeal shall not deprive the incorporators of their property without due process of law, and that the funda-

mental nature of the contract itself shall not be impaired.

In other words, when the stockholders of the plaintiff in error invested their money in the bank they had the right, under the Constitution of the United States, by the contract, to operate the bank subject to the laws of the State relative to banking, and the right to preserve, protect and defend their property against any encroachment of the state or nation except such as might be made according to the law of the land.

If this law is valid, it is but a small step to a law requiring all life insurance companies to guarantee the payment of each others policies.

If this law is valid, it is but a short step to a law requiring all fire insurance companies to guarantee the payment of each others losses.

If this law is valid, it is not a long step to a law requiring all corporations to guarantee the payment of each others debts.

If this law is valid, then corporate socialism is possible under the Constitution of the United States.

But, fortunately, we believe there is no other decision on record to support that of the Supreme Court of Oklahoma in the case at bar.

In Lake Shore & M. S. Ry. Co. vs. Smith, 173 U. S. 684, 19 Sup. Ct. Rep. 565, this court through Mr. Justice Peckham held that an act of the legislature of Michigan, unjustly establishing a rate for one thousand mile tickets, could not be justified as an amendment of the charter of the railroad, saying on page 570 of the Reporter that:

"To say that the legislature has power to absolutely repeal the charter of the company, and thus to terminate its legal existence, does not answer the objection that this particular exercise of legislative power is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of its creature. To terminate the charter, and thus end the legal life of the company, does not take away its poperty, but, on the contrary, leaves it all to the shareholders of the company after the payment of its debts."

And again on page 571 of the Reporter he says:

"The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation, even when the legislature has power to alter, amend, or repeal the charter thereof. The power to alter or amend does not extend to the taking of the property of the corporation either by confiscation or indirectly by other means."

The A. T. & S. F. R. R. Co. vs. Campbell, 61 Kans. 439, heretofore cited, the Supreme Court of that State held that an act of the legislature requiring railroad companies to furnish free transportation to a shipper of live stock was unconstitutional, and specifically denied the validity of the act as an attempted amendment of the charter.

In Mays vs. Seaboard Air Line R. Co. (S. C.) 56 S. E. 30, heretofore cited, the Supreme Court of South Carolina held that an act of the legislature requiring railroad companies to build side tracks for industries at the expense of the industry was unconstitutional, and expressly refused to sanction the law as an amendment to the charter of the railway, saying on page 34 of the Reporter:

"While the legislature is empowered to alter or amend the charter of the defendant, it is imperative upon it to respect the property of th defendant under the guaranties of the Constitution in so doing."

All the decisions of this court hold that the State cannot compel public service corporations to render service for less than a reasonable price. Indirectly those decisions embody this same question, because if the states had the arbitrary power to repeal charters, they could impose unreasonable charges upon the railroad companies upon pain of having their charter revoked.

The fact that such legislation has never been sought to be justified as an amendment of the charter of the railroads is very strong argument that the many able lawyers and judges who have argued and decided those questions regard the position as unworthy of mention.

The following authorities clearly establish the position we have taken, viz., that the reserved right to alter, amend or repeal a charter can never be exercised in such manner as to impair the rights of property protected and preserved by the Constitution of the United States:

In the Railroad Tax Cases, 13 Fed. 722, Mr. Justice Field on page 754 states the rule as follows:

"In the second place, the state, in the creation of corporations, or in amending their charters or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the federal constitution. It cannot impose the condition that they shall not resort to the courts of law for the redress of injuries or the protection of its property; that they shall make no complaint if their goods are plundered and their premises invaded; that they shall ask no indemnity if their lands be seized for public use, or be taken without due process of law, or that they shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the state may exercise unlimited and irresponsible power. Whatever the

state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. It may confer, by its general laws, upon corporations certain capacities of doing business, and of having perpetual succession of their members. It may make its grant in these respects revocable at pleasure; it may make the grant subject to modifications and impose conditions upon its use, and reserve the right to change these at will. But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoilation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

In Fletcher vs. Peck, 6 Cranch, at page 135, Chief Justice Marshall states the doctrine in the following language:

But, if an act done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

'It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

"To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

"It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated."

The sinking fund cases, 99 U. S. 700 to 769, examined the doctrine somewhat carefully, and we quote the following from the opinion of Chief Justice Waite on page 501 of the 25th Lawyers' edition:

"*That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made;* but, as was said by this court, through Mr. Justice Clifford, in Miller vs. State, 15 Wall., 498 (82 U. S., XXI., 104) 'It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of its assets;' and again, in Holyoke Company vs. Lyman, 15 Wall., 519 (82 U. S., XXI., 139): 'To protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the court, was even more explicit, when in Tomlinson vs. Jessup, 15 Wall., 459, (82 U. S., XXI., 206), he said: 'The reservation affects the entire relation between the State and the Coporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State;' and again, as late R. R. Co. vs. Maine, 96 U. S., 510 (XXIV., 840), 'By the reservation * * * the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company,

formed under it, of corporate rights, privileges, and immunities.' Mr. Justice Swayne, in Shields vs. Ohio, 95 U. S., 324 (XXIV., 358), says, by way of limitation: 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. *Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.' The rules as here laid down are fully sustained by authority. Further citations are unnecessary.*"

We also quote the following from the dissenting opinion of Mr. Justice Strong, on page 509:

"But if the Act of 1878 could be considered an alteration or amendment of the Acts of 1862 and 1864, the question would still remain; what was the extent of the power reserved by those Acts: I mean the power to alter, amend or repeal them. All the cases agree that such a reserved power is not without limits. I think its limits may be stated generally thus: It must be exercised, when exerted at all, so as to do no injustice to those to whom the franchise has been granted. Certainly the reservation cannot mean a right to take away the franchise, in whole or in part, and yet hold the grantee to the performance of the duties assumed, the consideration given for the grant. Nor can it mean to continue in the legislature power which the legislature never possessed, and which it is constitutionally incapable of exercising. A partial definition of the limits of the reserved power may be found in Com. vs. Essex Co., 13 Gray, 239, where Chief Justice Shaw (speaking of the reserved power to alter, amend or repeal a charter) said: 'It seems to us this power must have some limit, though it is difficult to define it. Suppose authority has been given by law to a railroad corporation to purchase a lot of land and hold it for purposes connected with its business, and they purchase such lot from a third person, could the Legislature prohibit the Company from holding it? If so, in whom would it vest? Or could the Legislature direct it to revert to the grantor or escheat to the public? Or how otherwise? Suppose a manufacturing company, incorporated, is authorized to construct a dam and flow a tract of meadow, and the owner claim gross damages, which are assessed and paid, can the Legislature afterwards alter

the act of incorporation so as to give to such meadow owners futre annual damages? Perhaps from these extreme cases, for extreme cases are allowable to test a legal principle, the rule to be exacted is this: *That where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a ligitimate exercise of the powers granted.' This rule has been recognized ever since. Vide,* Sage vs. Dillard, 15 B. Mon. 349. *It has been adopted by this court.* In Miller vs. State, 15 Wall., 478 (82 U. S. XXI., 98) it was said by Mr. Justice Clifford: *'Power to legislate founded upon such a reservation in a charter of a private corporation is certainly not without limits, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporations.' To the* same efect is Holyoke Co. vs. Lyman, 15 Wall., 500 (82 U. S., XXI., 133.)"

We also quote the following from the dissenting opinion of Mr. Justice Bradley on page 512:

"It seems to me that this clause has been greatly misunderstood. It is a sort of a proviso peculiar to American legislation, growing out of the decision in the Dart. Coll. case. Mr. Justice Story, in his opinion in that case, 4 Wheat. 675, says: 'When a private eleemosynary corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown than what is expressly or impliedly reserved by the charter itself. Unless a power be reserved for this purpose, the Crown cannot in virtue of its prorogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises.' This hint that such a reservation would authorize an alteration or amendment to be made in a charter, has been freely availed of by legislatures and constitutional conventions, in order to be freed from the constitutional restrictions against impairing the validity of contracts, so far as it applied to charters of incorporation. The application of that restriction to such charters, by construing them to be contracts within the meaning

of the Contsitution, was a surprise to many statesmen and jurists of the country. Chief Justice Marshall, indeed, in his opinion in that case, says: 'It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into the instrument.' 4 Wheat., 644. Probably in view of this somewhat unexpected application of the clause, operating as it did to deprive the States of nearly all legislative control over corporations of their own creation, the courts have given liberal construction to the reservation of power to alter, amend and repeal a charter; and have sustained some acts of legislation made under such a reservation which are, at least, questionable.

"'In my judgment, the reservation is to be interpreted as placing the State Legislature back on the same platform of power and control over the charter containing it as it would have occupied had the constitutional restriction about contracts never existed; and I think the reservation effects nothing more. It certainly cannot be interpreted as reserving a right to violate a contract at will. No legislature ever reserved such a right in any contract. Legislatures often reserve the right to terminate a continuous contract at will; but never to violate a contract, or change its terms, without the consent of the other party. The reserved power in question is simply that of legislation, to alter, amend or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract or alter it, or impair its obligation, would be repugnent to the contract itself, and void. A proviso repugnant to the granting part of a deed or to the enacting part of a statute is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of a right to violate an executed contract, it is not sustainable."

In Hill vs. Glasgow R. Co., 41 Federal 616, the principle is stated by Judge Jackson on page 616 of the Reporter as follows:

"The principle of these and other decisions upon the subject of amending or repealing charters under a reservation of power so to do, is that the legislature may change or modify the privileges and franchises which the state has granted to the corporation, and which concern the interests of the public; but dealing with what it has bestowed, either by way of withdrawal or of alteration, the state may not go further, and so legislate as to disturb, affect or impair rights either of the corporation or of its shareholders, previously acquired, while the corporate functions were being lawfully exercised. All rights thus acquired, of whatever, character, are surrounded and protected by constitutional sanctions and guaranties higher and superior to the legislative power of amendment or repeal. The decisions in the court of appeals of this state clearly recognize these general principles. Then, in the case of the City of Covington vs. Bridge Co., 10 Bush, 76, the court say, in reference to the power of amendment, that 'it is settled by an unbroken line of authority that the charter of a private corporation may vest such rights in the corporators and stockholders that no subsequent legislation can impair or diminish, and it is equally as well settled that such amendments of a charter may be made as are necessary to carry into effect or accomplish the purposes for which the charter was obtained.' So in Griffin vs. Insurance Co., 3 Bush, 594, it is said that 'the proviso (to act of 1865) was intended to secure the rights of beneficiaries and others, vested under the charter before its amendment or repeal, and does not affect the mere power to repeal the franchises.' So, also, Orr vs. Bracken Co., 81 Ky., 596.

"The right reserved by the General Statutes to amend or repeal privileges and franchises conferred by the charter is one thing, but the power to take from the stockholders or others rights or property interests, acquired or vested before such repeal or amendment, is another and quite a different thing. The first comes within the legislative authority; the second lies beyond the limits of such authority, because the legislatures cannot defeat or impair other rights previously vested, which have sprung up or grown out of such corporate privileges and franchises while the corporation was allowed to ex-

ercise the same. Applying these principles to the case made by the bill, the conclusion seems to be irresistible that the amendment of April 8, 1880, in so far as it directed that the proceeds arising or to arise from the sale or lease of the road should be applied, after paying the company's debts, to the liquidation of the indebtedness of two of the company's stockholders, to the exclusion of the other stockholders, was beyond the legislative power."

In People vs. O'Brien (N. Y.) 18 N. E. 692, the doctrine is stated on page 707 as follows:

"If, however, upon such examination, it is found that constitutional rights will be invaded by the operation of the statute, it is the duty of the courts to protect them by declaring the invalidity of the statute. Upon such examination, we are of the opinoin that chapter 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Broadway Surface Company, and its stockholders and creditors, its property, and bestow the benefit thereof upon the municipality of New York. The act attempts to preserve the validity of the consents held by the corporation, notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase price to the city. These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence, or transferred, except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership, without due process of law. Parker vs. Browning, 8 Paige, 388. Such legislation has been frequently and emphatically condemned. Taylor vs. Porter, 4 Hill, 147; Wyhehumer vs. People, 13 N. Y. 434; Westervelt vs. Gregg, 12 N. Y. 202; Kitburn vs. Thompson, 103 U. S. 168. In speaking of the reserved power to alter, amend, and repeal laws authorizing incorporations, in People vs. Railroad Co.

70 N. Y. 570, Judge Earl says: 'Under this reserved power, the legislature may impose upon railroad corporations such additional restrictions and burdens as the public good requires. It may not confiscate property, but it cannot be doubted that it may do all that is required by the act of 1874.' Judge Thompson said, in Dash vs. Van Kleeck, 7 Johns, 477: 'It is repugnant to the first principles of justice, and to the equal and permanent security of rights, to take, by law, the property of an individual, without his consent, and give it to another.'"

A valuable discussion of this subject is contained in the opinion of the Justices of the Supreme Court of New Hampshire, reported in 33 Atlantic, 1076. We call particular attention to pages 1080 to 1083 of that opinion and quote the following passage from the last named page:

"The charter is a statute which the grant of legislative power in the second article of the state constitution authorizes them to amend. Reserving the power of amendment is merely not parting with it. The retention of power that can exist only within constitutional limits is not an expansion of those limits. The eighteenth section of the charter could have been written in this form: 'The legislative power of amendment, vested by the constitution in the senate and house, is hereby retained by them, and is hereby extended beyond the constitutional province of legislation, and enlarged into a power of confiscation.' Such an extension clause cannot be implied. If it were implied, it would be no stronger than if it were expressed. If it were expressed, it would be void. The act of keeping the amending power does not add a word to the constitition, nor take a word from it, nor change the meaning given to 'legislative power' by the bill of rights."

While referring to this case we also wish to quote the following from page 1079 in reply to the position of the Oklahoma Supreme Court that we have not alleged our inability to earn reasonable profits in addition to paying the assessments for the guarantee fund.

To hold that under the reserved power to alter and repeal charters, the state can take the smallest part of the corporation's property for the benefit of other citizens, is equivalent to holding that it can take all the corporation's property and that the acceptance of the charter is a waiver by the corporation of all its constitutional rights. It cannot be possible that persons organizing a corporation thereby agree to permit the state, on the next day, to take their property for private use, to take their property for public use without confiscation, to strip them of all their belongings without due process of law. A mere statement of the proposition is complete refutation.

"Partial confiscation, disregarding the difference between right and wrong, rests on a distinction that cannot be maintained. The confiscation of a part of a farm or railroad, by taking the whole and paying less than it is worth, and the confiscation of the whole, by taking the whole and paying nothing, are acts of the same legal nature. Eaton vs. Railroad Co., 51 N. H. 504, 512. There is no constitutional ground on which an approval of one prisoned for life, by the same arbitrary method, without can be reconciled with the condemnation of the other. If the owner of property worth $400 can be compelled to sell it to the state for a less sum, the state may elect to pay him $399, or $1. If it can be taken from him on payment of $200, the property in which he invests $200 can be taken from him for half its value, and the depredation can be repeated, with a public profit, so long as he has anything worth taking. If he can be deprived of half of his house by a special statute, taking so much without compensation, he can be deprived of his liberty half of the time, or be entirely stripped of his property, and imprisoned for life, by the same arbitrary method, htiwout prisoned for life, by the same arbitrary method, without stated in an unlimited or a fractional form, is in conflict with fundamental rights that are now openly and directly attacked for the first time, in this state, since their safety was assured by the establishment of constitutional government at the close of the Revolutionary War."

The Oklahoma constitution is particularly strong upon this subject of impairing the obligation of contracts by amending charters of incorporation. Section 47 of Article 9 limits the legislature in such amendments to acting, "In such manner, however, that no injustice shall be done to the incorporators," and Section 1 of Article 14, requires the creation of a banking department, limited, however, "under laws which shall provide for the protection of depositors and the individual stockholders."

These provisions of our constitution limit the power of the legislature in amendments as was held by the Supreme Court of the United States in Vicksburg vs. Vicksburg Water Company, 202 U. S. 453,26 Supreme Court Reports 660, in which case a similar provision in the Constitution of Mississippi was construed as meaning that no amendments could be made which would work an injustice to the stockholders of the corporation.

A casual analysis of this law makes it clear that it is a palpable injustice to the stockholders of banks.

It may be well here to emphasize the point which has been mentioned before, and that is, that this law makes this assessment compulsory, and not only is it compulsory, but it applies by its terms to all banks in existence, whether created before or after the passage of the act.

It is doubtless true, that such a law could be enforced as to banks chartered after its passage, because then it would be optional with the persons desiring to organize a bank to incorporate or not, as they liked. If they chose to avail themselves of the law, they could not then object to it, but as to banks already in existence, that have no

This admission withdrawn
C. Blum

choice in the matter, the law does not operate upon them by their consent, but purports to compel them to act under its provisions.

In the opinion the Supreme Court refers to the depositor's guaranty fund laws which were enacted sixty or seventy years ago in Vermont and New York, but both of those states the laws only applied to banks chartered or re-chartered after the passage of the law, and did not pretend to compel banks already in existence to contribute to the fund.

Returning now to the question as to whether this law does an injustice to the stockholders of the plaintiff bank, it is manifest that it takes their property to pay the debts of some institution in which they have no interest, except as every citizen is interested in the payment of the debts of every other citizen.

It is a thing to be desired by all the people, that all the other people be successful and prosperous. That, however, is very different from requiring all the people to guarantee the debts of all the other people.

This law is unjust to the stockholders of pre-existing banks, because it compels them, not only to guarantee the conduct of their bank, but that of every other bank.

Under the law which was in force when the plaintiff bank was organized, its stockholders were liable to the depositors of the bank to the extent of their stock and one hundred per cent additional. This was their contract with the state. To impose upon them this additional and unlimited liability is a material impairment of their contract, and unjust to them to the extent of every dollar taken from them without their consent.

Hathom vs. Calif., 2 Wall. 10, 17 Ed. 776.
McDonnell vs. Ala. etc. Co. (Ala.), 5 So. 120.
Ireland vs. The P. B. etc. Co., 19 Ohio St. 369.

Under the law then in force, a man in determining whether he would take stock in a bank, would inquire where the bank was to be located; how much capital was to be invested in it; who his associates were to be; who should compose the board of directors of the bank, who should be the officers controlling its funds, and making its loans and investments. He would know that he, as a stockholder, would always have a voice in the selection of the board of directors, and would always have access to the books and papers of the bank so that he might personally watch its affairs as closely as he desired. He would also know just exactly what his liability as a stockholder would be, and that he would not be liable for the misconduct of any other bank or person except his own.

Under this law, the stockholder of one bank has nothing to say about the location of other banks. He has no voice in determining how much capital shall be invested in any particular locality. He has no right to select the board of directors of any other bank. He has no right to a voice in selecting its officers. He has no right to examine its books and familiarize himself with its operations. He has no share in its profits. Notwithstanding this, he is subjected to the charge of paying pro rata all its debts. He is, in effect, for the purpose of liability, made a stockholder in every bank in the State, but is not permitted to share in its profits, or exercise any influence in its operations.

To state these facts is to demonstrate that this law does not protect his interests, and does work upon him an injustice.

This being true, the law cannot be justified as an amendment of the charter of plaintiff's bank.

Another injustice forced upon the stockholder of a state bank is the provision of the law relative to national banks. They, if they elect, can avail themselves of the benefits of the law, and yet, they will not be subject to all further assessments which may be levied by the board.

National banks can not guarantee the debts of any other person or corporation. They cannot become accommodation endorsers. This is settled by numerous authorities. In the event, therefore, of a big bank failure, the national banks which have availed themselves of the benefits of the law can, if they desire, refuse to pay further assessments and leave the state banks to bear all the burdens of future assessments.

The plaintiff bank is perfectly solvent. It is amply able to pay all of its depositors. Its stockholders are safe. To compel them to pay the debts of some other bank is unjust to them and deprives them of that protection which the constitution requires.

While we regard it as unnecessary to cite authorities to show that a national bank can not become surety for the debt of another, still if the court desires to examine the cases, the following establish the contention:

National Park Bank vs. G. A. N. W. & S. Co., 116 N. Y. 281.

Park Hotel Co. vs. Fourth National Bank, (C. C. A.) 86 Fed. 724.

Lyons vs. Potter & Co. vs. First National Bank. 85 Fed. 120 and 122.

National Bank of Commerce vs. Atkinson, 55 Fed. 465.

The national banks having no power to enter into this guaranty contract would not be estopped from repudiating it as against all future assessments.

Bank vs. Kennedy, 167 U. S. 326-371. 17 Sup. Ct. Rep. 831.

Union Pac. Ry. Co. vs. Chicago, R. I & P R. R. Co., 163 U. S. 564-581; 16 Sup. Ct. Rep. 1173.

Central Transportation Co. vs Pullman Palace Car Co., 139 U. S. 24, 60; 11 Sup. Ct. Rep. 1174-1178.

Railroad Co. vs. Hooper, 160 U. S. 154, 525, 530; 16 Sup. Ct. Rep. 379.

The unanimous consent of the stockholders would not strengthen the case.

Germania Safety Vault Co. vs. Boyenton, 71 Fed. 797.

EIGHTH AND NINTH.

We do not think it necessary to argue these subdivisions further than to refer to the authorities cited in our opening outline of the brief.

For the reasons herein stated, we believe the law to be unconstitutional, and therefore, think the judgment of the Supreme Court should be reversed.

Respectfully submitted,

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and

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